SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 589

COMMISSIONER OF INTERNAL REVENUE PETITIONER

vs.

WILLIAM D. DISSTON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

633683—45——1

1a In the Tax Court of the United States

Docket entries

(Docket No. 109985)

Feb. 19, 1942—Petition received and filed. Taxpayer notified. Fee not paid.
Feb. 19, 1942—Request for Circuit hearing in Philadelphia, Pa. filed by taxpayer. 2-24-42 copy served.
Feb. 23, 1942—Copy of petition served on General Counsel.
Feb. 23, 1942—Fee paid—check.
Apr. 13, 1942—Answer filed by General Counsel.
Apr. 16, 1942—Copy of answer served on taxpayer, (Philadelphia, Pa.).
July 25, 1942—Hearing set September 14, 1942—Philadelphia, Pa.
Aug. 20, 1942—Notice of appearance of Harold Evans as counsel for taxpayer filed.
Aug. 20, 1942—Notice to send all notices to Harold Evans filed by Cuthbert H. Latta, Jr.
Sept. 14, 1942—Hearing had before Mr. Hill, on the merits. Submitted. Motion of petitioner to consolidate no objection by respondent, granted. Stipulation of facts and supp. stipulation of facts filed at hearing. Briefs due Oct. 14, 1942, reply briefs due Oct. 29, 1942.
Sept. 30, 1942—Transcript of hearing 9-14-42 filed.
Oct. 14, 1942—Brief filed by taxpayer.
Oct. 16, 1942—Motion for leave to file the attached brief, brief lodged filed by General Counsel. 10-16-42 granted and served 10-17-42.

Docket Entries (No. 109985)

2a Oct. 17, 1942—Copy of brief served on General Counsel.
Feb. 4, 1943—Memorandum opinion rendered, Hill, Judge. Decision will be entered under Rule 50. 2-5-43 copy served.
Feb. 26, 1943—Computation of deficiency filed by General Counsel.
Mar. 5, 1943—Hearing set March 24, 1943 on settlement.
Mar. 12, 1943—Consent to settlement filed by taxpayer.
Mar. 15, 1943—Decision entered, Sam B. Hill, Judge, Div. 2.
June 8, 1943—Petition for review by U. S. Circuit Court of Appeals, 3rd Circuit, with assignments of error filed by taxpayer.

June 8, 1943—Notice of filing petition for review sent to J. P. Wenchel, filed.

June 9, 1943—Proof of service of filing petition for review (J. P. Wenchel), filed.

July 1, 1943—Stipulation as to record filed.

3a In the Tax Court of the United States

Petition

Filed February 19, 1942

(Docket No. 109985)

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (MT-ET-GT-1068-37) dated November 21, 1941, and as a basis of this proceeding alleges as follows:

1. The petitioner is an individual residing at 8840 Norwood Avenue, Philadelphia, Pennsylvania. The gift tax return for the period here involved was filed with the Collector of Internal Revenue for the First District of Pennsylvania.

2. The notice of deficiency (a copy of which, marked exhibit A, is attached hereto) was mailed to the petitioner on or about November 21, 1941.

3. The tax in controversy is gift tax for the calendar year 1937, the deficiency which has been asserted with respect thereto is in the amount of $644.48. The entire deficiency is in dispute.

4. The determination of tax as set forth in said notice of deficiency is based upon the following errors:

(a) In computing the amount of net gifts made by the petitioner during the year 1937, the Commissioner of Internal Revenue erred in disallowing an exclusion of $5,000 on account of a gift made by the petitioner to his son, William L. Disston, in disallowing an exclusion of $5,000 on account of a gift made by the petitioner to his daughter, Rachel Elizabeth Disston, and in disallowing an exclusion of $5,000 on account of a gift made by the petitioner to his daughter, Patricia Disston.

4a (b) The Commissioner of Internal Revenue erred in holding that the gifts referred to in the proceeding subparagraph (a) were gifts of future interests.

(c) The Commissioner of Internal Revenue erred in his computation of the tax for the year 1937 in that, despite the fact that the statute of limitations precluded any adjustment in the computation of net gifts made by the petitioner during the year 1936, the

Commissioner of Internal Revenue made adjustments in the computation of such net gifts for the year 1936 and thereby increased the rate of tax payable with respect to any net gifts which may have been made by the petitioner during the year 1937.

(d) Even if the computation of net gifts made by the petitioner during the year 1936 were subject to adjustment at this time by the Commissioner of Internal Revenue, nevertheless the Commissioner of Internal Revenue erred in adjusting such computation by allowing an exclusion of only $470, instead of $5,000, on account of gifts made by the petitioner dufing that year to his son, William L. Disston, by disallowing an exclusion of $5,000 on account of a gift made by the petitioner during that year to his daughter, Rachel Elizabeth Disston, and by disallowing an exclusion of $5,000 on account of a gift made by the petitioner during that year to his daughter, Patricia Disston.

(e) The Commissioner of Internal Revenue erred in holding that the gifts referred to in the preceding subparagraph (d) with respect to which no exclusion was allowed were gifts of future interests.

(f) The Commissioner of Internal Revenue erred in finding a deficiency in gift tax for the year 1937 in the amount of $644.48.

(g) The Commissioner of Internal Revenue erred in failing to find that there was no deficiency in gift tax for the year 1937.

5a 5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) By deed dated December 17, 1936, from the petitioner to Liberty Title and Trust Company et al., trustees (a copy of which deed, marked exhibit B, is attached hereto), the petitioner created a trust for the benefit of each of his five children, namely: Dorothea D. James, Delborah Disston, William L. Disston, Rachel Elizabeth Disston, and Patricia Disston.

(b) On January 1, 1938, William L. Disston, Rachel Elizabeth Disston, and Patricia Disston had not attained the age of twenty-one years.

(c) On or about March 8, 1937, the petitioner filed a gift tax return for the year 1936.

(d) Subsequently said gift tax return for the year 1936 was audited and, after making minor adjustments in the petitioner's gift tax liability as reported in the return, the Commissioner of Internal Revenue determined that during the year 1936 the petitioner had made the following gifts aggregating $71,952.49:

To Deborah Disston	$488.33
To William L. Disston	488.33
To Dorothea P. Disston (the petitioner's wife)	6,000.00
To the trustees under said deed of trust dated December 17, 1936	64,975.83

The Commissioner further determined that the petitioner was entitled to an exclusion of $5,000 on account of the gift to each of his said five children and also on account of the gift to his wife, and hence that the petitioner's net gifts for the year 1936, after deducting an exemption of $40,000, amounted to $1,952.49 on which tax was assessed and paid.

(e) On March 21, 1937, the petitioner transferred to the
6a trustees under said deed dated December 17, 1936, 500 shares of the capital stock of Henry Disston & Sons having an aggregate value of $25,000, and upon receipt thereof the trustees allocated 100 shares, having a value of $5,000, to the trust for each of the petitioner's said five children.

Wherefore the petitioner prays that this Board may hear the proceeding, may find that the Commissioner of Internal Revenue erred in asserting a deficiency and may find that there is no deficiency.

(S) WILLIAM D. DISSTON,
William D. Disston,
8840 Norwood Avenue, Philadelphia, Penna.,
Petitioner.

(S) CUTHBERT H. LATTA, Jr.,
Cuthbert H. Latta, Jr.,
1000 Provident Trust Building,
Philadelphia, Penna.,
Counsel for Petitioner.

[*Duly sworn to by William D. Disston; jurat omitted in printing.*]

7a *Exhibit A to petition*

TREASURY DEPARTMENT

WASHINGTON

Office of Commissioner of Internal Revenue

NOVEMBER 21, 1941.

Address Reply to Commissioner of Internal Revenue and Refer to MT-ET-GT-1068-37-1st Pennsylvania, Donor—William D. Disston.

Mr. WILLIAM D. DISSTON,
8840 Norwood Avenue, Philadelphia, Pennsylvania.

SIR: You are advised that the determination of your gift tax liability for the calendar year 1937 discloses a deficiency of $644.48 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the inclosed form and forward it to this office. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period
8a terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully.

GUY T. HELVERING,
Commissioner.

By (s) D. S. BLISS,
D. S. Bliss,
Deputy Commissioner.

Incl.—9543.

STATEMENT

Calendar Year 1937

The deficiency is computed as follows:

	Returned	Determined
Total gifts, 1937, other than charitable, public, and similar gifts	$25,000.00	$25,000.00
Less exclusions	25,000.00	10,000.00
Amount of gifts included	0.00	15,000.00
Less specific exemption	0.00	0.00
Net gifts, 1937	0.00	15,000.00
Net gifts for preceding years	0.00	[1] 16,482.49
Total net gifts	0.00	31,482.49
Tax on total net gifts	0.00	988.95
Tax on net gifts for preceding years	0.00	344.47
Tax on net gifts, 1937	0.00	644.48
Tax shown on return		0.00
Deficiency, 1937		644.48

[1] Net gifts for preceding years are in accordance with the following adjustments made in connection with your 1936 return.

9a The deficiency results from the following adjustments:

SCHEDULE A

	Determined	Returned
Exclusions	$10,000.00	$25,000.00
To balance (amount of increase)	15,000.00	

No exclusions are allowed with respect to the gifts to the trust dated December 17, 1936, for the benefit of William L. Disston, Rachel Elizabeth Disston and Patricia Disston since the trust provides that the income payable to these beneficiaries is to be accumulated until they attain the age of twenty-one years. The trust also provides that the trustees shall apply such income as may be necessary for the education, comfort and support of the respective minors, and shall accumulate for each minor until he or she reaches the age of twenty-one years, all income not so needed. Since it may not be necessary for the trustees to use any part of the income and since the minor beneficiaries do not receive the absolute unrestricted right to the immediate use and enjoyment of the income and/or principal of the trust estate, the transfers in question are considered to be gifts of future interests against which no exclusions are allowable.

STATEMENT—1936

The adjustments are set forth as follows:

	Prior Determination	Redetermination
Total gifts, 1936, other than charitable, public and similar gifts	71,952.49	71,952.49
Less exclusions	30,000.00	15,470.00
Amount of gifts included	41,952.49	56,482.49
Less specific exemption	40,000.00	40,000.00
Net gifts, 1936	1,952.49	16,482.49

10a The increase results from the following adjustments:

SCHEDULE A

	Redetermination	Prior Determination
Exclusions	15,470.00	30,000.00
To balance (amount of increase)	14,530.00	

No exclusions are allowed with respect to the gifts in trust for the benefit of William L. Disston, Rachel Elizabeth Disston, and Patricia Disston since such gifts are considered to be gifts of future interests against which no exclusions are allowable. See explanation relative to disallowance of exclusions in connection with your 1937 return.

The exclusions allowable are set forth as follows:

William L. Disston	$470.00
Dorothea P. Disston	5,000.00
Dorothea D. James	5,000.00
Deborah Disston	5,000.00
Total	15,470.00

Exhibit B to Petition in No. 109985, Deed of Trust dated December 17, 1936, is the same as Exhibit 1 to Stipulation of Facts, printed at pp. 29a–41a infra.

11a In the Tax Court of the United States

Answer

Filed April 13, 1942

(Docket No. 109985)

Now comes the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition in the above-entitled proceeding, admits and denies as follows:

1. Admits the allegation of paragraph 1 of the petition.

2. Admits the allegations of paragraph 2 of the petition.

3. Admits the allegations of paragraph 3 of the petition.

4. (a) to (g) Denies the allegations of paragraphs 4 (a) to (g), inclusive, of the petition.

5. (a) Admits that by deed dated December 17, 1936, from the petitioner to Liberty Title and Trust Company, et al., trustees, the petitioner created a trust for the benefit of each of his five children, namely, Dorothea D. James, Deborah Disston, William L. Disston, Rachel Elizabeth Disston and Patricia Disston; denies the remaining allegations of paragraph 5 (a) of the petition.

5. (b) Admits the allegations of paragraph 5 (b) of the petition.

(c) Admits that the petitioner filed a gift tax return for the year 1936; denies the remaining allegations of paragraph 5 (c), of the petition.

(d) Admits that said gift tax return for the year 1936 was audited and after making minor adjustments in the petitioner's gift tax liability as reported in the return, the Commissioner of Internal Revenue determined that during the year 1936 the petitioner had made the following gifts aggregating $71,952.49:

12a

To Deborah Disston	$488.33
To William L. Disston	488.33
To Dorothea P. Disston (the petitioner's wife)	6,000.00
To the trustees under said deed of trust dated December 17, 1936	64,975.83

Further admits that the petitioner was allowed an exclusion of $5,000.00 on account of the gift to each of his said five children and also on account of the gift to his wife; and hence that the petitioner's net gifts for the year 1936 after deducting an exemption of $40,000.00 was computed to be $1,952.49 on which tax was assessed and paid; denies the remaining allegations of paragraph 5 (d) of the petition.

(e) Admits the allegations of paragraph 5 (e) of the petition.

6. Denies generally each and every allegation of the petition not hereinabove specifically admitted, qualified or denied.

Wherefore, it is prayed that the petition be denied.

(Signed) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
HARTFORD ALLEN,
Division Counsel,
HARRY L. BROWN,
Special Attorney,
Bureau of Internal Revenue.

13a In the Tax Court of the United States

Docket entries

(Docket No. 110630)

Apr. 18, 1942—Petition received and filed. Taxpayer notified. Fee paid.
Apr. 18, 1942—Request for Circuit hearing in Philadelphia, Pa. filed by taxpayer. 4-2-42 copy served.
Apr. 20, 1942—Copy of petition served on General Counsel.
June 10, 1942—Answer filed by General Counsel.
June 13, 1942—Copy of answer served on taxpayer (Philadelphia, Pa.).
July 25, 1942—Hearing set September 14, 1942 in Philadelphia, Pa.
Aug. 20, 1942—Notice of appearance of Harold Evans as counsel for taxpayer filed.
Aug. 20, 1942—Notice to send all notices to Harold Evans filed by Cuthbert H. Latta, Jr.
Sept. 14, 1942—Hearing had before Mr. Hill on the merits. Submitted. Motion of petitioner to consolidate with Dkt. 109985, granted. Stipulation of facts filed, supplemental stipulation of facts filed. Briefs due Oct. 14, 1942, reply 15 days Oct. 29, 1942.
Sept. 30, 1942—Transcript of hearing September 14, 1942 filed.
Oct. 14, 1942—Brief filed by taxpayer.

Oct. 16, 1942—Motion for leave to file the attached brief, brief lodged filed by General Counsel. 10-16-42 granted and served 10-19-42.

Oct. 17, 1942—Copy of brief served on General Counsel.

14a Feb. 4, 1943—Memorandum opinion rendered, Hill, Judge, #2. Decision will be entered under Rule 50. 2-5-43 copy served.

Feb. 26, 1943—Computation filed by General Counsel.

Mar. 3, 1943—Hearing set 3-24-43 on settlement.

Mar. 12, 1943—Consent to settlement filed by taxpayer.

Mar. 15, 1943—Decision entered, Sam B. Hill, Judge, Div. 2.

June 8, 1943—Petition for review by U. S. Circuit Court of Appeals, 3rd Circuit, with assignments of error filed by taxpayer.

June 8, 1943—Notice of filing petition for review sent to J. P. Wenchel filed.

June 9, 1943—Proof of service of filing petition for review sent to J. P. Wenchel filed.

July 1, 1943—Stipulation as to record filed.

15a In the Tax Court of the United States

Petition

Filed April 18, 1942

(Docket No. 110630)

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (SN-GT-1) dated February 19, 1942, and as a basis of this proceeding alleges as follows:

1. The petitioner is an individual residing at 8840 Norwood Avenue, Philadelphia, Pennsylvania. The gift tax return for the period here involved was filed with the Collector of Internal Revenue for the First District of Pennsylvania.

2. The notice of deficiency (a copy of which, marked Exhibit A, is attached hereto) was mailed to the petitioner on or about February 19, 1942.

3. The tax in controversy is gift tax for the calendar year 1938, the deficiency which has been asserted with respect thereto is in the amount of $1,430.08. The entire deficiency is in dispute.

4. The determination of the tax as set forth in said notice of deficiency is based upon the following errors:

(a) In computing the amount of net gifts made by the petitioner during the year 1938, the Commissioner of Internal Revenue erred

in disallowing an exclusion of $5,000 on account of a gift made by the petitioner to his daughter, Rachel Elizabeth Disston, and in disallowing an exclusion of $5,000 on account of a gift made by the petitioner to his daughter, Patricia Disston.

(b) The Commissioner of Internal Revenue erred in holding that the gifts referred to in the preceding subparagraph (a) were gifts of future interests.

(c) The Commissioner of Internal Revenue erred in his
16a computation of the tax for the year 1938 in that, despite the fact that the statute of limitations precluded any adjustment in the computation of net gifts made by the petitioner during the year 1936, the Commissioner of Internal Revenue made adjustments in the computation of such net gifts for the year 1936 and thereby increased the rate of tax payable with respect to any net gifts which may have been made by the petitioner during the year 1938.

(d) Even if the computation of net gifts made by the petitioner during the year 1936 were subject to adjustment at this time by the Commissioner of Internal Revenue, nevertheless the Commissioner of Internal Revenue erred in adjusting such computation by allowing an exclusion of only $470, instead of $5,000, on account of gifts made by the petitioner during that year to his son, William L. Disston, by disallowing an exclusion of $5,000, on account of a gift made by the petitioner during that year to his daughter, Rachel Elizabeth Disston, and by disallowing an exclusion of $5,000 on account of a gift made by the petitioner during that year to his daughter, Patricia Disston.

(e) The Commissioner of Internal Revenue erred in holding that the gifts referred to in the preceding subparagraph (d) with respect to which no exclusion was allowed were gifts of future interests.

(f) The Commissioner of Internal Revenue erred in computing the amount of net gifts made by the petitioner for prior years by disallowing an exclusion of $5,000 on account of a gift made by the petitioner during the year 1937 to his son, William L. Disston; by disallowing an exclusion of $5,000 on account of a gift made by the petitioner during the year 1937 to his daughter, Rachel Elizabeth Disston; and by disallowing an exclusion of $5,000 on account of a gift made by the petitioner during the year 1937 to his daughter, Patricia Disston.

17a (g) The Commissioner of Internal Revenue erred in holding that the gifts referred to in the preceding subparagraph (f) with respect to which no exclusion was allowed were gifts of future interests.

(h) The Commissioner of Internal Revenue erred in finding a deficiency in gift tax for the year 1938 in the amount of $1,430.08.

(i) The Commissioner of Internal Revenue erred in failing to find that there was no deficiency in gift tax for the year 1938.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) By deed dated December 17, 1936, from the petitioner to Liberty Title and Trust Company et al., trustee (a copy of which deed, marked Exhibit "B", is attached hereto), the petitioner created a trust for the benefit of his five children, namely: Dorothea D. James, Deborah Disston, William L. Disston, Rachel Elizabeth Disston and Patricia Disston.

(b) On January 1, 1938, William L. Disston, Rachel Elizabeth Disston, and Patricia Disston had not attained the age of twenty-one years.

(c) On or about March 8, 1937, the petitioner filed a gift tax return for the year 1936.

(d) Subsequently said gift tax return for the year 1936 was audited and, after making minor adjustments in the petitioner's gift tax liability as reported in the return, the Commissioner of Internal Revenue determined that during the year 1936 the petitioner had made the following gifts aggregating $71,952.49:

To Deborah Disston	$488.33
To William L. Disston	488.33
To Dorothea P. Disston (the petitioner's wife)	6,000.00
18a To the trustees under said deed of trust dated December 17, 1936	64,975.83

The Commissioner further determined that the petitioner was entitled to an exclusion of $5,000 on account of the gift to each of his said five children and also on account of the gift to his wife, and hence that the petitioner's net gifts for the year 1936, after deducting an exemption of $40,000 amounted to $1,952.49 on which tax was assessed and paid.

(e) On March 21, 1937, the petitioner transferred to the trustees under said deed dated December 17, 1936, 500 shares of the capital stock of Henry Disston & Sons having an aggregate value of $25,000, and upon receipt thereof the trustees allocated 100 shares, having a value of $5,000, to the trust for each of the petitioner's said five children.

(f) By deed dated December 9, 1938, from the petitioner to Dorothea D. James, et al., trustees (a copy of which deed marked Exhibit C is attached hereto), the petitioner created a trust for the benefit of each of his five children, namely, Dorothea D. James, Deborah Disston Swartz, William L. Disston, Rachel Elizabeth Disston, and Patricia Disston.

(g) By said deed of trust dated December 9, 1938, the petitioner conveyed to said trustees two tracts of land (a full description of said tracts is contained in Schedule A of the deed of trust marked Exhibit C which is attached hereto) valued at $38,581.54.

(h) On January 1, 1939, Rachel Elizabeth Disston and Patricia Disston had not attained the age of twenty-one years.

Wherefore the petitioner prays that this Board may hear
19a the proceedings, may find that the Commissioner of Internal Revenue erred in asserting a deficiency and may find that there is no deficiency.

WILLIAM D. DISSTON,
8840 Norwood Avenue, Philadelphia, Penna.,
Petitioner.

CUTHBERT H. LATTA, Jr.,
1000 Provident Trust Building, Philadelphia, Penna.,
Counsel for Petitioner.

[*Duly sworn to by William D. Disston; jurat omitted in printing.*]

20a *Exhibit A to petition*

SN-GT-1

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
PHILADELPHIA, PA., *February 19, 1942.*

Mr. WILLIAM D. DISSTON,
8840 Norwood Avenue, Philadelphia, Pennsylvania.

SIR: You are advised that the determination of your gift tax liability for the calendar year 1938 discloses a deficiency of $1,430.08, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to this office. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner,

By R. I. MILES,
Revenue Agent in Charge.

Enclosures:
Statement.
Form of waiver.
Form 272M.
BMN/pk.

21a STATEMENT

William D. Disston, Donor, 8840 Norwood Avenue, Philadelphia Pennsylvania

Tax Liability for Calendar Year 1938

	Liability	Assessed	Deficiency
Gift Tax	$1,716.81	$286.73	$1,430.08

In making this determination of your gift tax liability, careful consideration has been given to the report of examination dated January 8, 1942.

Adjustments to Net Gifts

Schedule A of return:

	Returned	Determined
Total gifts, other than charitable, public, and similar gifts, 1938	$41,761.95	$41,504.62
Less exclusions	27,923.08	17,923.08
Included amount of gifts	13,838.87	23,581.54
Net gifts	13,838.87	23,581.54

Explanation of Adjustments

Schedule A of return:

Item 1—94 acres farm land	38,620.00	38,362.67

This item had been included in the amount appraised as shown in the records.

Exclusions	27,923.08	17,923.08

The two exclusions claimed in connection with gifts in trust for Rachel Elizabeth Disston and Patrica Disston have been disallowed.

It has been held that these are gifts of future interest, against which no exclusions are allowable.

22a Computation of Gift Tax

	Returned	Determined
Net gifts for 1938	$13,838.87	$23,581.54
Total net gifts for preceding years	None	31,482.49
Total net gifts	13,838.87	55,064.03
Tax on total net gifts	265.17	2,705.76
Tax on net gifts for preceding years	None	988.95
Tax on net gifts for 1938	265.17	1,716.81

Tax assessed:		
Original, March 1939 list, Page 202, line 9	265.17	
Additional, 11/39 list, Page 290, line 0	21.56	
		286.73
Deficiency of gift tax, 1938		1,430.08

Explanation of Adjustments to Total Net Gifts for Prior Years

Total net gifts for prior years:		
Calendar year 1936	None	16,482.49
Calendar year 1937	None	15,000.00
Total		31,482.49

Adjustments to Net Gifts for 1936

Total gifts	71,802.50	71,952.49
Less exclusions	30,000.00	15,470.00
Included amount of gifts	41,802.50	56,482.49
Less: Specific exemption	40,000.00	40,000.00
Net gifts, 1936	1,802.50	16,482.49

Adjustments to Net Gifts for 1937

Total gifts	25,000.00	25,000.00
Less exclusions	25,000.00	10,000.00
Included amount of gifts	None	15,000.00

23a The three exclusions of $5,000.00 each claimed for gifts in trust in the above-mentioned years have been disallowed. It has been held that they represent gifts of future interest against which no exclusions are allowable.

Exhibit B to Petition in No. 110630, Deed of Trust dated December 17, 1936, is the same as Exhibit 1 to Stipulation of Facts, printed at pp. 29a–41a, infra.

Exhibit C to Petition in No. 110630, Deed of Trust dated December 9, 1938, is the same as Exhibit 2 to Stipulation of Facts, printed at pp. 42a–55a, infra.

24a In the Tax Court of the United States

Answer

Filed June 10, 1942

(Docket No. 110630)

Now comes the Commissioner of Internal Revenue by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue,

and for answer to the petition in the above-entitled proceeding admits and denies as follows:

1. Admits the allegations of paragraph 1 of the petition.

2. Admits the allegations of paragraph 2 of the petition.

3. Admits the allegations of paragraph 3 of the petition.

4. (a) to (i) Denies the allegations of paragraph 4 (a) to (i), inclusive, of the petition.

5. (a) Admits that by deed dated December 17, 1936, from the petitioner to Liberty Title and Trust Company, et al., trustees, the petitioner created a trust for the benefit of each of his five children, namely, Dorothea D. James, Deborah Disston, William L. Disston, Rachel Elizabeth Disston, and Patricia Disston; denies the remaining allegations of paragraph 5 (a) of the petition.

(b) Admits the allegations of paragraph 5 (b) of the petition.

(c) Admits that the petitioner filed a gift tax return for the year 1936; denies the remaining allegations of paragraph 5 (c) of the petition.

5. (d) Admits that said gift tax return for the year 1936 was audited, and, after making minor adjustments in the petitioner's gift tax liability as reported in the return, the Commissioner
25a of Internal Revenue determined that during the year 1936 the petitioner had made the following gifts aggregating $71,952.49:

To Deborah Disston	$488.33
To William L. Disston	488.33
To Dorothea P. Disston (the petitioner's wife)	6,000.00
To the trustees under said deed of trust dated December 17, 1936	64,975.83

Further admits that the petitioner was allowed an exclusion of $5,000.00 on account of the gift to each of his said five children and also on account of the gift to his wife, and, hence, that the petitioner's net gifts for the year 1936, after deducting an exemption of $40,000.00, was computed to be $1,952.49, on which tax was assessed and paid; denies the remaining allegations of paragraph 5 (d) of the petition.

(e) Admits the allegations of paragraph 5 (e) of the petition.

(f) Admits that by deed dated December 9, 1938, from the petitioner to Dorothea D. James, et al., trustees, the petitioner created a trust for the benefit of each of his five children, namely, Dorothea D. James, Deborah Disston Swartz, William L. Disston, Rachel Elizabeth Disston, and Patricia Disston; denies the remaining allegations of paragraph 5 (f) of the petition.

(g) Admits that by said deed of trust dated December 9, 1938, the petitioner conveyed to said trustees two tracts of land valued at $38,581.54; denies the remaining allegations of paragraph 5 (g) of the petition.

5. (h) Admits the allegations of paragraph 5 (h) of the petition.

26a 6. Denies generally each and every allegation of the petition not hereinabove specifically admitted, qualified, or denied.

Wherefore, it is prayed that the petition be denied.

(Signed) J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
HARTFORD, ALLEN,
Division Counsel,
HARRY L. BROWN,
Special Attorney,
Bureau of Internal Revenue.

27a In the Tax Court of the United States

Stipulation of facts

(Docket Nos. 110630 and 109985; Filed at hearing September 14, 1942)

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that for the purposes of the above-entitled proceedings, the Board may accept the following statements as true and include them in its Findings of Fact. It is further agreed that neither party hereto shall be precluded from introducing at the hearing in this matter any further facts not inconsistent with those stated herein.

1. William D. Disston, the petitioner herein, is an individual residing at 8840 Norwood Avenue, Philadelphia, Pennsylvania. The gift tax returns for the periods here involved were filed with the Collector of Internal Revenue for the First District of Pennsylvania.

2. By deed dated December 17, 1936, from the petitioner to Liberty Title and Trust Company et al., trustees (a copy of which Deed is in evidence as Exhibit 1) the petitioner created a trust for the benefit of each of his five children, namely: Dorothea D. James, Deborah Disston, William L. Disston, Rachael Elizabeth Disston, and Patricia Disston.

3. Petitioner filed a gift tax return for the year 1936. Subsequently said gift tax return for the year 1936 was audited by the Commissioner and, after making minor adjustments in the petitioner's gift tax liability as reported in the return, the Commissioner of Internal Revenue determined that during the year 1936

the petitioner had made the following gifts aggregating $71,952.49:

To Deborah Disston	$488.33
To William L. Disston	488.33
To Dorothea P. Disston (the petitioner's wife)	6,000.00
To the trustees under said deed of trust dated December 17, 1936	64,975.83

28a The Commissioner allowed the petitioner an exclusion of $5,000.00 on account of the gift to each of his said five children and also on account of the gift to his wife, and hence the petioner's net gifts for the year 1936, after deducting an exemption of $40,000.00 were computed to be $1,952.49 on which tax was assessed and paid.

4. On March 21, 1937, the petitioner transferred to the trustees under said deed dated December 17, 1936, 500 shares of the capital stock of Henry Disston & Sons having an aggregate value of $25,000.00, and upon receipt thereof the trustees allocated 100 shares, having a value of $5,000.00 to the trust for each of the petitioner's said five children.

5. By deed dated December 9, 1938, from the petitioner to Dorothea D. James, et al, trustees (a copy of which deed is in evidence as Exhibit 2), the petitioner created a trust for the benefit of each of his five children, namely, Dorothea D. James, Deborah Disston Swartz, William L. Disston, Rachel Elizabeth Disston, and Patricia Disston.

6. By said deed of trust dated December 9, 1938, the petitioner conveyed to said trustees two tracts of land valued at $38,581.54.

7. The respective dates of birth of petitioner's five children are as follows:

Dorothea D. James	May 2, 1912.
Deborah Disston Swartz	April 21, 1915.
William L. Disston	April 12, 1917.
Rachael Elizabeth Disston	May 2, 1919.
Patricia Disston	February 23, 1924.

HAROLD EVANS,
Counsel for Petitioner.
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

29a *Exhibit 1 to stipulation of facts*

This deed of trust made this 17th day of December 1936 between William Dunlop Disston, of the City and County of Philadelphia and State of Pennsylvania, hereinafter called the Settlor, of the one part, and Liberty Title and Trust Company, Dorothea D. James, and Deborah Disston, and such other additional trustees as

may qualify in accordance with the terms hereof, hereinafter called the Trustees of the other part, witnesseth that:

First. Creation of Trust: In consideration of One Dollar ($1.00) paid by Trustees to Settlor at the execution hereof, the receipt of which is hereby acknowledged, and for the purpose of settling the property herein mentioned upon the trusts herein declared, Settlor hereby grants, assigns, and sets over unto Trustees and their successors All That Certain property more particularly described in Schedule "A" hereto attached and made a part hereof, together with all other property which may at any time be added to the principal of this trust, to be held by Trustees upon the following trusts:

Second. Terms of the Trust: Trustees shall divide the principal of the trust into five equal shares and shall hold, manage, invest, and reinvest the principal of said shares in accordance with the powers hereinafter granted, In Trust, Nevertheless, as follows:

1. As to one of said equal shares of principal, to pay over to Dorothea D. James in not less than quarterly instalments the entire net income derived therefrom during her lifetime; provided, however, that upon her reaching the age of forty-five years one-third of the principal of her share shall be paid over to her free and discharged of all trusts; and upon further trust upon her death whether before or after reaching the age of forty-five years, to divide the principal of her share, or such portion thereof
30a as is then held by the Trustees, among her then living descendants (including children, if any, legally adopted by her or her descendants) in such amounts as she shall by will appoint, and in default of such appointment, to divide the same equally per stirpes among such of her said descendants as are living at the time of such distribution, and in default of such descendants then living, to divide the principal equally per stirpes among such of Settlor's other children and their descendants (including children, if any, legally adopted by any of them) as are then living; provided, however, that if said daughter shall die before reaching the age of forty-five years, the said powers of appointment shall be subject to the right of the said daughter to appoint to her husband during his lifetime or for any shorter period such portion of the annual net income from her share of principal as she may elect, not to exceed, however, one-third of such income.

2. As to the second of said equal shares of principal, to pay over to Deborah Disston in not less than quarterly instalments, the entire net income derived therefrom during her lifetime; provided, however, that upon her reaching the age of forty-five years one-third of the principal of her share shall be paid over to her free and discharged of all trusts; and upon further trust upon her death whether before or after reaching the age of forty-five

years, to divide the principal of her share, or such portion thereof as is then held by the Trustees, among her then living decendants (including children, if any, legally adopted by her or her descendants) in such amounts as she shall by will appoint, and in default of such appointment, to divide the same equally per stirpes among such of her said descendants as are living at the time of such distribution, and in default of such descendants then living, to divide the principal equally per stirpes among such of Settlor's other children and their descendants (including children, if any, legally adopted by any of them) as are then living; pro-

31a vided, however, that if said daughter shall die before reaching the age of forty-five years, the said powers of appointment shall be subject to the right of the said daughter to appoint to her husband during his lifetime or for any shorter period such portion of the annual net income from her share of principal as she may elect, not to exceed, however, one-third of such income.

3. As to the third of said equal shares of principal, to accumulate the net income therefrom for the benefit of William L. Disston until he reaches the age of twenty-one years, at which time to pay over to him all accumulated income, and thereafter to pay over to him in not less than quarterly instalments the entire net income derived therefrom during his lifetime; provided, however, that upon his reaching the age of forty-five years one-half of the principal of his share shall be paid over to him free and discharged of all trusts; and upon further trust upon his death whether before or after reaching the age of forty-five years, to divide the principal of his share, or such portion thereof as is then held by the Trustees, among his then living descendants (including children, if any, legally adopted by him or his descendants) in such amounts as he shall by will appoint, and in default of such appointment, to divide the same equally per stirpes among such of his said descendents as are living at the time of such distribution, and in default of such descendants then living, to divide the principal equally per stirpes among such of Settlor's other children and their descendants (including children, if any, legally adopted by any of them) as are then living; provided, however, that if said son shall die before reaching the age of forty-five years, the said powers of appointment shall be subject to the right of the said son to appoint to his wife during her lifetime or for any shorter period such portion of the annual net income from his share of principal as he may elect, not to exceed, however, one-half of such income.

32a 4. As to the fourth of said equal shares of principal to accumulate the net income therefrom for the benefit of Rachel Elizabeth Disston until she reaches the age of twenty-one years, at which time to pay over to her all accumulated income and

thereafter to pay over to her in not less than quarterly instalments the entire net income derived therefrom during her lifetime; provided, however, that upon her reaching the age of forty-five years one-third of the principal of her share shall be paid over to her free and discharged of all trusts, and upon further trust upon her death whether before or after reaching the age of forty-five years, to divide the principal of her share, or such portion thereof as is then held by the Trustees, among her then living descendants (including children, if any, legally adopted by her or her descendants) in such amounts as she shall by will appoint, and in default of such appointment, to divide the same equally per stirpes among such of her said descendants as are living at the time of such distribution and in default of such descendants then living, to divide the principal equally per stirpes among such of Settlor's other children and their descendants (including children, if any, legally adopted by any of them) as are then living; provided, however, that if said daughter shall die before reaching the age of forty-five years, the said powers of appointment shall be subject to the right of the said daughter to appoint to her husband during his lifetime or for any shorter period such portion of the annual net income from her share of principal as she may elect, not to exceed, however, one-third of such income.

5. As to the fifth of said equal shares of principal, to accumulate the net income therefrom for the benefit of Patricia Disston until she reaches the age of twenty-one years, at which time to pay over to her all accumulated income and thereafter to pay over to her in not less than quarterly instalments the entire net income derived therefrom during her lifetime; provided, however, that

33a upon her reaching the age of forty-five years one-third of the principal of her share shall be paid over to her free and discharged of all trusts; and upon further trust upon her death whether before or after reaching the age of forty-five years, to divide the principal of her share, or such portion thereof as is then held by the Trustees, among her then living descendants (including children, if any, legally adopted by her or her descendants) in such amounts as she shall by will appoint, and in default of such appointment, to divide the same equally per stirpes among such of her said descendants as are living at the time of such distribution, and in default of such descendants then living, to divide the principal equally per stirpes among such of Settlor's other children and their descendants (including children, if any, legally adopted by any of them) as are then living; provided, however, that if said daughter shall die before reaching the age of forty-five years, the said powers of appointment shall be subject to the right of the said daughter to appoint to her husband during his lifetime or for any shorter period such portion

of the annual net income from her share of principal as she may elect, not to exceed, however, one-third of such income.

6. Trustees shall hold the shares of minors in whom the principal shall have vested during their respective minorities, and during such time shall apply such income therefrom as may be necessary for the education, comfort and support of the respective minors, and shall accumulate for each minor until he or she reaches the age of twenty-one years, all income not so needed. The foregoing clause shall apply to minor children of the Settlor irrespective of the direction heretofore set forth to accumulate all income for such minors. In the administration of the shares of the minors, the Trustees shall have all of the powers, duties and discretions, including the power of investment and reinvestment, as are conferred upon them as Trustees hereunder.

Third. Protective Clause: All the shares of principal
34a and income hereby given shall be free from anticipation, assignment pledge or obligations of beneficiaries; and shall not be subject to any execution or attachment, so far as may be permissible in law.

Fourth, Trustees' Powers: The corporate trustee shall have the custody of all deeds for real estate, evidence of title, and all personal assets of the trust estate and shall when requested so to do consult with and advise the individual trustees. The proceeds of the sale of any and all real estate together with all income, including rentals from real estate which shall be collected by the individual trustees, shall be delivered by them to the corporate trustee, but the corporate trustee shall not be responsible therefor until actual receipt thereof. The corporate trustee shall upon the written request of a majority of the individual trustees and without further charge therefor assume such collections of income from real and personal estate as may be designated in said request. The corporate trustee shall render accounts of all receipts and disbursements at such intervals as may be specified by a majority of the then acting individual trustees. The corporate trustee shall not have the right to vote upon any matter connected with the administration of the trust estate, but all such matters, including the investment and reinvestment of principal, shall be determined by a majority vote of the individual trustees then acting; provided, however, that if after all of Settlor's children shall have come of age the number of individual trustees shall be reduced to less than three by reason of death, resignation or other cause, in such case and thereafter the corporate trustee shall have the right to vote upon matters connected with the administration of the trust estate, excepting only matters concerning the stock of Henry Disston & Sons, Inc., all of which matters shall at all times remain in the exclusive control of the indi-

dividual trustees, subject only to the right of the Settlor to direct the voting of said stock as hereinafter provided. The corporate trustee, during such period as it is not entitled to vote, shall be relieved of all liability or responsibility for the administration of the trust estate, excepting the proper handling of collections when entrusted to it and the safekeeping of funds and assets and the proper accounting therefor. Except in the case of borrowing money where the unanimous consent of the individual trustees shall be required, a majority of the individual trustees then acting as such shall have in addition to the powers vested in fiduciaries by law the following powers:

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1. To retain the investments which Settlor has hereby assigned, transferred, and delivered to Trustees and any further investments which Settlor may hereafter assign, transfer, and deliver to Trustees for so long as they shall think best without liability for depreciation or loss; invest and reinvest without being confined to so-called legal securities, including the right to invest in preferred and common stocks of corporations, and to pay any money or take any action which they shall think best for the protection of any investments; provided, however, that except in the case of the sale of real estate by Trustees, not more than ten thousand dollars ($10,000.00) shall be invested in any one mortgage and then only when the entire mortgage is acquired by such investment; and, provided further, that, except in the case of the sale of real estate by Trustees, no investment shall be made in any mortgage upon any church, club, theater, factory, hotel, or apartment house, it being Settlor's intention that such mortgage investment shall be limited in general to first mortgages on homes occupied by the owner or occupied by a tenant under a satisfactory lease.

2. To purchase and hold real estate, give options upon, amicably partition, mortgage, and lease the same with full power to enter into leases for any length of time which shall seem wise and without authority of any court.

3. To sell real and/or personal estate at public or private sale for such price or prices and upon such terms as may seem best and give good and sufficient deeds and bills of sale therefor, without any necessity on the part of the purchaser to see to the application of the purchase money and without authority of any court.

36a

4. To purchase investments at a premium and charge the premium either against principal or income, or partly against principal and partly against income as may be deemed best, and the decision of the Trustees shall be binding and conclusive on all parties interested therein.

5. To exercise any option which may be given to the holders to subscribe to new stocks or bonds or other instruments in the nature

thereof and to join in any plan of reorganization, consolidation, or merger and to deposit securities thereunder as well as under the terms of any voting trust agreement; to vote in person or by proxy with respect to any stocks held by the Trustees, provided, however, that during the life of the Settlor, the Trustees shall be required to vote in such manner as Settlor shall direct with respect to all Stocks received from Settlor either at the creation of the trust or thereafter.

6. By unanimous action of the individual trustees and with the consent of the Settlor during his lifetime, to borrow such sum or sums from time to time as may seem necessary and advisable for the preservation or advantage of the trust estate with full power to pledge as collateral therefor such securities as may be necessary, without any liability on the persons making said loans to see to the application of the proceeds thereof. Settlor may, however, at any time by a writing addressed to the Trustees surrender or renounce this power of consent and thereafter shall possess no such power.

7. To apply the income to which any beneficiary shall be entitled hereunder for the maintenance, education, and support of such beneficiary should he or she by reason of age, illness, or any other cause in the opinion of the Trustees be incapable of dispensing it.

Payment by the Trustees to the parent of any minor or to
37a the person with whom such minor resides and the receipt of such parent or such person shall be sufficient acquittance and discharge to the Trustees for such payment or payments.

8. To expend out of the share of principal from which any beneficiary may be receiving income under this deed of trust such sums as Trustees may consider to be for the best interests of such beneficiaries during illness or emergency of any kind; provided, however, that in no case shall such expenditures of principal exceed in the aggregate ten percent (10%) of the value of such share of principal as appraised at the date of such expenditure, including in such appraisement sums of principal theretofore expended under this clause.

9. Any and all income, including dividends declared but not yet received, which was accrued on investments at the time of the delivery of the same at this time or hereafter by the Settlor to the Trustees shall be treated by the Trustees as income and shall be distributed to the beneficiary or beneficiaries accordingly.

10. During the lifetime of Settlor he shall have the power if he shall so desire to designate to the Trustees any securities in which the principal fund or any part thereof shall be invested, and the Trustees are hereby freed and discharged of any liability for any depreciation or loss that may occur in the investments so designated by Settlor. Settlor may, however, at any time by a

writing addressed to the Trustees surrender or renounce this power of designation and thereafter shall possess no such power.

Fifth. Right to Add to Trust: Settlor reserves the right by deed, will, or in any other manner, to add other real and personal property to this trust, all of which additions shall be held and applied as part of this trust.

Sixth. Irrevocability: This trust is hereby made expressly irrevocable.

38a Seventh. Additional Trustees: As William L. Disston, Rachel Elizabeth Disston, and Patricia Disston respectively come of age, they are hereby appointed as additional trustees with all the powers and authority granted to the original trustees in accordance with the terms of this deed of trust.

Eighth. Right to Appoint Substituted Trustees: It is hereby expressly agreed that the corporate trustee may be removed at any time by the action of a majority of the then acting individual trustees as evidenced by a writing signed by them and filed with the corporate trustee, provided, however, that the said individual trustees then acting shall at the same time by a writing signed by a majority of them and recorded in the Office of the Recorder of Deeds for Philadelphia County appoint as substituted corporate trustee another trust company of the City of Philadelphia, and such removal and substitution is hereby confirmed, and such substituted trustee shall have all of the powers heretofore granted to the original trustee. In the case of such removal, the persons having the power of said removal may if they so desire approve the accounting of the corporate trustee, and such approval shall be a full and complete acquittance and discharge of the corporate trustee with respect to its acts and transactions included in such accounting.

Ninth. Compensation of Trustees: The Compensation to be paid the corporate trustee shall be two per cent (2%) on principal, two per cent (2%) on income from personalty and three per cent (3%) on income from real estate. The compensation to be paid the individual trustees shall be two per cent (2%) on each of the three foregoing classifications, the said compensation to be divided among the then acting trustees in such manner as they or a majority of them may agree. The foregoing compensation to the corporate and individual trustees respectively shall be in full and complete payment for all services of every character rendered by the said trustees.

39a Tenth. Acceptance of Trust: This trust has been accepted by the Trustees in the State of Pennsylvania, and all questions pertaining to its validity, construction, and administration shall be governed and controlled by the laws of that State.

In witness whereof the Settlor and the Trustees have caused these presents to be duly executed the day and year first above written.

[SEAL] (S) WILLIAM DUNLOP DISSTON,
LIBERTY TITLE AND TRUST COMPANY,
By (S) J. N. FORT, Jr., *President.*

Witness:
(S) CHAS. A. DONELLY,
Attest:
(S) J. W. FLEMING,
Secretary.

[SEAL] (S) DOROTHEA D. JAMES.
[SEAL] (S) DEBORAH DISSTON.
(S) WM. H. VOEHL.

40a STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On this 17th day of December 1936, before me, the subscriber, a notary public in and for the County of Philadelphia, State of Pennsylvania, personally appeared William D. Disston, the Settlor named in the foregoing instrument, who acknowledged the same to be his act and deed.

Witness my hand and notarial seal the day and year aforesaid.

[SEAL] (S) WM. H. VOEHL,
Notary Public.

Commission expires February 10, 1939.

I am not a director or officer of the corporation party hereto.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On this 17th day of December 1936, before me, the subscriber, a notary public in and for the County of Philadelphia, State of Pennsylvania, personally appeared J. E. Fleming who, being duly sworn, did say that he is secretary of Liberty Title and Trust Company, the Corporate Trustee named in the foregoing deed of trust; that he is authorized as such to execute said instrument and that the seal affixed thereto is the corporate seal of said Liberty Title and Trust Company.

Witness my hand and notarial seal the day and year aforesaid.

[SEAL] (S) WM. H. VOEHL,
Notary Public.

Commission expires February 10, 1939.

I am not a director or officer of the corporation party hereto.

41a STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On this 23rd day of December 1936, before me, the subscriber, a notary public in and for the County of Philadelphia, State of Pennsylvania, personally appeared Dorothea D. James, who, being duly sworn, did say that she is one of the individual trustees named in the foregoing instrument and that she executed it and acknowledged it to be her act and deed.

Witness my hand and notarial seal the day and year aforesaid.

[SEAL] (S) WM. H. VOEHL,
Notary Public.

Commission expires February 10, 1939.

I am not a director or officer of the corporation party hereto.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On this 23rd day of December 1936, before me, the subscriber, a notary public in and for the County of Philadelphia, State of Pennsylvania, personally appeared Deborah Disston, who, being duly sworn, did say that she is one of the individual trustees named in the foregoing instrument and that she executed it and acknowledged it to be her act and deed.

Witness by hand and notarial seal the day and year aforesaid.

[SEAL] (S) WM. H. VOEHL,
Notary Public.

Commission expires February 10, 1939.

I am not a director or officer of the corporation party hereto.

42a SCHEDULE "A"

1,000 shares Henry Disston and Sons, Inc.

$5,000 Par Value Stanley Crandall Company of Washington, Twenty year First Mortgage 6% S. F. Gold Bonds due August 1, 1946.

Exhibit 2 to stipulation of facts

This Deed of Trust made this 9th day of December 1938 between William Dunlop Disston, of the City and County of Philadelphia and State of Pennsylvania, hereinafter called the Settlor, of the one part, and Dorothea D. James, Deborah D. Swartz, and William L. Disston, and such other additional trustees as may qualify in accordance with the terms hereof, hereinafter called the Trustees, of the other part, witnesseth that:

First. Creation of Trust: In consideration of One Dollar ($1.00) paid by the Trustees to the Settlor at the execution hereof, the receipt of which is hereby acknowledged, and for the purpose

of settling the property herein mentioned upon the trusts herein declared, the Settlor hereby grants, assigns and sets over unto the Trustees and their successors All That Certain property more particularly described in Schedule "A" hereto attached and made a part hereof; together with all other property which may at any time be added to the principal of this trust, to be held by the Trustees upon the following trusts:

Second. Terms of the Trust: The Trustees shall divide the principal of the trust into five equal shares and shall hold, manage, invest and reinvest the principal of said shares in accordance with the powers hereinafter granted, In Trust, Nevertheless, as follows:

1. As to one of said equal shares of principal, to pay over
43a to the Settlor's daughter, Dorthea D. James, in not less than quarterly instalments the entire net income derived therefrom during her lifetime; provided, however, that upon her reaching the age of forty-five years one-third of the principal of her share shall be paid over to her free and discharged of all trusts; and upon further trust upon her death whether before or after reaching the age of forty-five years, to divide the principal of her share, or such portion thereof as is then held by the Trustees, among such of her then living descendants (including children, if any, legally adopted by her or her descendants) and in such amounts as she shall by will appoint, or in default of such appointment, to divide the same equally per stirpes among such of her said descendants as are living at the time of such distribution, or in default of such descendants then living, to divide the principal equally per stirpes among such of the Settlor's other children and their descendants (including children, if any, legally adopted by any of them) as are then living; provided, however, that if said daughter shall die before reaching the age of forty-five years the said power of appointment shall be subject to the right of the said daughter to appoint to her husband during his lifetime or for any shorter period the annual net income from not more than one-third of her share of principal.

2. As to the second of said equal shares of principal, to pay over to the Settlor's daughter, Deborah D. Swartz, in not less than quarterly instalments the entire net income derived therefrom during her lifetime; provided, however, that upon her reaching the age of forty-five years one-third of the principal of her share shall be paid over to her free and discharged of all trusts; and upon further trust upon her death, whether before or after reaching the age of forty-five years, to divide the principal of her share, or such portion thereof as is then held by the Trustees, among such of her then living descendants (including children, if any, legally

adopted by her or her descendants) and in such amounts as
44a she shall by will appoint, or in default of such appointment, to divide the same equally per stirpes among such of her said descendants as are living at the time of such distribution, or in default of such descendants then living, to divide the principal equally per stirpes among such of the Settlor's other children and their descendants (including children, if any, legally adopted by any of them) as are then living: provided, however, that if said daughter shall die before reaching the age of forty-five years, the said power of appointment shall be subject to the right of the said daughter to appoint to her husband during his lifetime or for any shorter period the annual net income from not more than one-third of her share of principal.

3. As to the third of said equal shares of principal, to pay over to the Settlor's son, William L. Disston, in not less than quarterly instalments the entire net income derived therefrom during his lifetime; provided, however, that upon his reaching the age of forty-five years one-half of the principal of his share shall be paid over to him free and discharged of all trusts; and upon further trust upon his death, whether before or after reaching the age of forty-five years, to divide the principal of his share, or such portion thereof as is then held by the Trustees, among such of his then living descendants (including children, if any, legally adopted by him or his descendants) and in such amounts as he shall by will appoint, or in default of such appointment, to divide the same equally per stirpes among such of his said descendants as are living at the time of such distribution, or in default of such descendants then living, to divide the principal equally per stirpes among such of the Settlor's other children and their descendants (including children, if any, legally adopted by any of them) as are then living; provided, however, that if said son shall die before reaching the age of forty-five years, the said power of appointment shall be subject to the right of the said son to appoint to his wife
45a during her lifetime or for any shorter period the annual net income from such part or all of his share of principal as he may elect.

4. As to the fourth of said equal shares of principal, to accumulate the net income therefrom for the benefit of the Settlor's daughter, Rachel Elizabeth Disston, until she reaches the age of twenty-one years, at which time to pay over to her all accumulated income and thereafter to pay over to her in not less than quarterly instalments the entire net income derived therefrom during her lifetime, provided, however, that upon her reaching the age of forty-five years one-third of the principal of her share shall be paid over to her free and discharged of all trusts and upon further trust upon her death, whether before or after reaching the age

of forty-five years, to divide the principal of her share, or such portion thereof as is then held by the Trustees, among such of her then living descendants (including children, if any, legally adopted by her or her descendants) and in such amounts as she shall by will appoint, or in default of such appointment, to divide the same equally per stirpes among such of her said descendants as are living at the time of such distribution, or in default of such descendants then living, to divide the principal equally per stirpes among such of the Settlor's other children and their descendants (including children, if any, legally adopted by any of them) as are then living; provided, however, that if said daughter shall die before reaching the age of forty-five years, the said power of appointment shall be subject to the right of the said daughter to appoint to her husband during his lifetime or for any shorter period the annual net income from not more than one-third of her share of principal.

5. As to the fifth of said equal shares of principal, to accumulate the net income therefrom for the benefit of the Settlor's daughter, Patricia Disston, until she reaches the age of twenty-one years, at which time to pay over to her all accumulated income and
46a thereafter to pay over to her in not less than quarterly instalments the entire net income derived therefrom during her lifetime; provided, however, that upon her reaching the age of forty-five years one-third of the principal of her share shall be paid over to her free and discharged of all trusts; and upon further trust upon her death, whether before or after reaching the age of forty-five years, to divide the principal of her share, or such portion thereof as is then held by the Trustees, among such of her then living descendants (including children, if any, legally adopted by her or her descendants) and in such amounts as she shall by will appoint, or in default of such appointment, to divide the same equally per stirpes among such of her said descendants as are living at the time of such distribution, or in default of such descendants then living, to divide the principal equally per stirpes among such of the Settlor's other children and their descendants (including children, if any, legally adopted by any of them) as are then living; provided, however, that if said daughter shall die before reaching the age of forty-five years, the said power of appointment shall be subject to the right of the said daughter to appoint to her husband during his lifetime or for any shorter period the annual net income from not more than one-third of her share of principal.

6. The Trustees shall hold the shares of minors in whom the principal shall have vested during their respective minorities, and during such time shall apply such income therefrom as may be necessary for the education, comfort and support of the respective

minors, and shall accumulate for each minor, until he or she reaches the age of twenty-one years, all income not so needed. The foregoing clause shall apply to minor children of the Settlor, among others, irrespective of the direction heretofore set forth to accumulate all income for such minors. In the administration of the shares of the minors, the Trustees shall have all of the
47a powers, duties and discretions including the power of investment and reinvestment, which are conferred upon them as Trustees hereunder.

Third. Protective Clause: All shares of principal and income hereby given shall be free from anticipation, assignment, pledge, or obligations of beneficiaries and shall not be subject to any execution or attachment, so far as may be permissible in law.

Fourth. Trustees' Powers: The Trustees, and the survivors and survivor of them and their successors, shall have, in addition to the powers vested in fiduciaries by law, the following powers:

1. To retain the investments and other property which the Settlor has hereby assigned, transferred, and delivered to the Trustees and any further investments and property which the Settlor may hereafter assign, transfer, and deliver to the Trustees for so long as they shall think best without liability for depreciation or loss; to invest and reinvest without being confined to so-called legal securities, including the right to invest in preferred and common stocks of corporations, and to pay any money or take any action which they shall think best for the protection of any investments; provided, however, that except in the case of the sale of real estate by the Trustees, not more than ten thousand dollars ($10,000.00) shall be invested in any one mortgage and then only when the entire mortgage is acquired by such investment; and, provided further, that, except in the case of the sale of real estate by the Trustees, no investment shall be made in any mortgage upon any church, club, theater, factory, hotel, or apartment house, it being the Settlor's intention that such mortgage investment shall be limited in general to first mortgages on homes occupied by the owner or occupied by a tenant under a satisfactory lease.

2. To purchase and hold real estate; to lease any real estate which may at any time constitute part of the trust
48a estate upon such terms and for such periods of time (even extending beyond the duration of the trusts hereunder) as the Trustees in their sole judgment may consider advisable; to construct, alter, repair, remodel, and reconstruct buildings and other improvements of every description on any such real estate; to lay out, open, and construct road improvements, as well as sidewalks and curbing, and dedicate the same to the public use; to construct, lay, and maintain water, gas, and power lines, and other similar facilities, and to consent to the use or dedication of any

such real estate for any such facilities; to employ such experts, engineers, agents, and employees as the Trustees may consider advisable to assist them in connection with the management, maintenance, development, improvement, subdivision, and sale of any such real estate; to pay for the services of any such experts, engineers, agents, and employees on a commission or such other basis as the Trustees in their sole judgment may consider advisable; to charge all expenses in connection with the management, maintenance, development, improvement, subdivision, and sale of any real estate held by the Trustees against either the income from or the principal of the trust estate, whichever the Trustees in their sole judgment may consider proper; to mortgage any such real estate; to impose restrictions upon any such real estate; to partition amicably any such real estate; to exchange and give options upon any such real estate; to sell at either public or private sale any such real estate for such prices and upon such terms and conditions as the Trustees in their sole judgment may consider proper, and to make, execute, and deliver to the purchasers thereof good and sufficient deeds of conveyance thereof and all assignments, transfers, and other legal instruments which may be either necessary or convenient for passing the title and ownership thereto, free and discharged of all trusts and without any liability on the part of the purchasers to see to the application of the purchase money.

49a 3. To sell all personal property held at any time by the Trustees at public or private sale for such prices and upon such terms as may seem best and to give good and sufficient deeds and bills of sale therefor, without any necessity on the part of the purchaser to see to the application of the purchase money and without authority of any court.

4. To purchase investments at a premium and to charge the premium either against principal or income, or partly against principal and partly against income, as may be deemed best, and the decision of the Trustees shall be binding and conclusive on all parties interested therein.

5. To exercise any option which may be given to the holders to subscribe to new stocks or bonds or other instruments in the nature thereof; to join in any plan of reorganization, consolidation or merger and deposit securities thereunder as well as under the terms of any voting trust agreement; and to vote in person or by proxy with respect to any stocks held by the Trustees.

6. By unanimous action of the Trustees to borrow such sum or sums from time to time as may seem necessary and advisable for the preservation or advantage of the trust estate, with full power to pledge as collateral therefor such securities as may be necessary, without any liability on the persons making said loans to see to the application of the proceeds thereof.

7. To apply the income to which any beneficiary shall be entitled hereunder for the maintenance, education and support of such beneficiary should he or she, by reason of age, illness or any other cause, in the opinion of the Trustees, be incapable of dispensing it.

8. To expend out of the share of principal from which any beneficiary may be receiving income under this deed of trust such sums as the Trustees may consider to be for the best interests of such beneficiary during illness or emergency of any kind;
50a provided, however, that in no case shall such expenditures of principal exceed in the aggregate ten per cent (10%) of the value of such share of principal as appraised at the date of such expenditure, including in such appraisement sums of principal theretofore expended under this clause.

9. Any and all income, including dividends declared but not yet received, which has accrued on investments at the time of the delivery of the same at this time or hereafter by the Settlor to the Trustees shall be treated by the Trustees as income and shall be distributed to the beneficiary or beneficiaries accordingly.

10. Each and every power and authority conferred upon the Trustees hereunder shall continue unabated and in full force after the termination, in whole or in part, of the trusts hereby created, or any thereof, until the whole of the trust estate shall have been distributed to and actually received by those ultimately entitled thereto, to the end that the Trustees shall have full power and authority either to convert the trust estate into money for distribution or to convert part into money for distribution and to distribute part in kind.

Fifth. Right to Add to Trust: The Settlor reserves the right by deed, will, or in any other manner to add other real and personal property to this trust, all of which additions shall be held and applied as part of the principal of this trust.

Sixth. Irrevocability: This trust is hereby made expressly irrevocable.

Seventh. Additional Trustees: As Rachel Elizabeth Disston and Patricia Disston respectively come of age, they are hereby appointed as additional Trustees. All additional and successor Trustees shall possess all the powers and authorities granted to the original Trustees in accordance with the terms of this deed of trust.

51a Eighth. Compensation of Trustees: The compensation to be paid the Trustees shall be two per cent (2%) on principal and two per cent (2%) on income from personalty and real estate, such compensation to be divided among the Trustees from time to time acting hereunder in such manner as they or a majority of them may agree. The foregoing compensation shall

be in full and complete payment for all services of every character rendered by the Trustees. However, the cost of the accounting work in connection with this trust shall not be covered by or payable out of such compensation, but the Trustees shall have the right to expend such sums from the principal of or income from the trust estate as may be necessary to employ an accountant to do such accounting work.

Ninth. All powers hereinbefore granted to the Trustees, with the exception of the power to brorrow sums of money, may be exercised by a majority of the trustees and it shall not be necessary to have the unanimous consent of the Trustees except in the case of borrowing money as aforesaid.

Tenth. Acceptance of Trust: This Trust has been accepted by the Trustees in the State of Pennsylvania, and all questions pertaining to its validity, construction and administration shall be governed and controlled by the laws of that State.

In witness whereof The Settlor and the Trustees have caused these presents to be duly executed the day and year first above written.

(Sgd.) WILLIAM DUNLOP DISSTON. [SEAL]
(Sgd.) DOROTHEA D. JAMES. [SEAL]
(Sgd.) DEBORAH D. SWARTZ. [SEAL]
(Sgd.) WILLIAM L. DISSTON. [SEAL]

Witness:

W. LOGAN MACCOY.
ANNA M. DORNAN.

52a STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On this 9th day of December 1938, before me, the subscriber, a notary public in and for the County of Philadelphia, State of Pennsylvania, personally appeared William Dunlop Disston, the Settlor named in the foregoing instrument, who acknowledged the same to be his act and deed.

Witness my hand and notarial seal the day and year aforesaid.

[SEAL] ANNA M. DORNAN,
Notary Public.

My Commission Expires April 1, 1939.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On this 9th day of December 1938, before me, the subscriber, a notary public in and for the County of Philadelphia, State of Pennsylvania, personally appeared Dorothea D. James, who, being duly sworn, did say that she is one of the individual trustees

named in the foregoing instrument and that she executed it and acknowledged it to her act and deed.

Witness my hand and notarial seal the day and year aforesaid.

[SEAL] ANNA M. DORNAN,
Notary Public.

My Commission Expires April 1, 1939.

53a STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On this 9th day of December 1938, before me, the subscriber, a notary public in and for the County of Philadelphia, State of Pennsylvania, personally appeared Deborah D. Swartz, who, being duly sworn, did say that she is one of the individual trustees named in the foregoing instrument and that she executed it and acknowledged it to be her act and deed.

Witness my hand and notarial seal the day and year aforesaid.

[SEAL] ANNA M. DORNAN,
Notary Public.

My Commission Expires April 1, 1939.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On this 9th day of December 1938, before me, the subscriber, a notary public in and for the County of Philadelphia, State of Pennsylvania, personally appeared William L. Disston, who, being duly sworn, did say that he is one of the individual trustees named in the foregoing instrument and that he executed it and acknowledged it to be his act and deed.

Witness my hand and notarial seal the day and year aforesaid.

[SEAL] ANNA M. DORNAN,
Notary Public.

My Commission Expires April 1, 1939.

54a SCHEDULE "A"

1. All that certain messuage, plantation, and tract of land situate in the Township of Whitemarsh, County of Montgomery and State of Pennsylvania, bounded and described as follows, to wit: Beginning at a stone in the Mathers Mill Road in the line of lands now or late of Daniel H. Mulvaney; thence partly along said road and partly by lands late of Thomas Danolt, deceased, South 49 degrees West 117 perches to a stone in the line of lands late of William Freas, deceased; thence by the said lands of William Freas and Charles Cox and land late of George Egbert, deceased, and since of John Wood, deceased, Southeastwardly 135

perches to a stone a corner of lands late of James Mitchell, now of Charles Cox; thence partly by said lands and partly by lands late of John Cox Northeastwardly 115 perches to a stone a corner of other lands late of John Cox now of Robert Maguire; thence by said land North 47 degrees West 126 perches to the place of beginning. Containing ninety-six acres of land, be the same more or less. Excepting and reserving therefrom and thereout the following:

All that certain lot or piece of ground with the buildings and improvements thereon erected, Situate in Whitemarsh Township, County of Montgomery and State of Pennsylvania, and described according to a plan or survey thereof made by Milton R. Yerkes, Civil Engineer, of Bryn Mawr, Pa., dated July 28, 1927, as follows, to wit: Beginning at a spike in the middle of Cold Point Road at the distance of 1,057.02 feet measured Southwestwardly along the middle line of Cold Point Road from an angle in said road, said angle being situate at the distance of 2,410 feet, more or less, measured in a Westerly direction from the middle of Stenton Avenue; thence extending from said point of beginning by other land of William D. Disston, of which the land hereby con-
55a veyed is a part, South 45 degrees 21 mintes East 330 feet to a point; thence still by other land of the said William D. Disston South 44 degrees 39 minutes West 298 feet to a point; thence still by other land of the said William D. Disston North 45 degrees 21 minutes West 330 feet to a spike in the middle of the aforesaid Cold Point Road; thence extending along the middle line of the said Cold Point Road North 44 degrees 39 minutes East 298 feet to the place of beginning. Containing 2.258 acres, be the same more or less.

2. All That Certain triangular lot or piece of land Situate in the Township of Whitemarsh, in the County of Montgomery and State of Pennsylvania, bounded and described as follows, viz: Beginning at a point at the distance of 125 feet measured Northwardly from a point in and at right angles to the line established as the center line of the railroad of The Pennsylvania Railroad Company (Trenton Branch) said point in center line being distant 3,029.65 feet measured Eastwardly along said center line from a point therein over the center of Undergrade Bridge No. 17.93 which carries the said railroad over the Norristown and Flowertown Road; extending thence by land of the Manor Real Estate and Trust Company North 43 degrees 7 minutes East 305.67 feet to a stone; thence by land of William D. Disston South 44 degrees 50 minutes East 361.81 feet; thence by other land of the said Railroad Company on a line parallel with the said center line and 125 feet distant Northerly therefrom North 85 degrees

58 minutes West 465.85 feet to the place of beginning. Containing 1.272 acres, more or less.

56a In the Tax Court of the United States

Supplemental stipulation of facts

(Docket Nos. 109985 and 110630)

Filed at hearing September 14, 1942

It Is Hereby Stipulated and Agreed by and between the parties hereto, by their respective attorneys, that for the purposes of the above entitled proceedings the following statements of fact are true. Each of the parties hereto may object to any or all of the said facts as inadmissible and may introduce at the hearing in this matter any further facts not inconsistent with those stated herein.

1. Gross income of each of the trusts created under deed dated December 17, 1936, for the three minor beneficiaries, William L. Disston, Rachel Elizabeth Disston, and Patricia Disston, for the years 1936, 1937, and 1938 was as follows:

WILLIAM L. DISSTON	
1936	$300.00
1937	815.42
1938	69.00
RACHEL ELIZABETH DISSTON	
1936	$300.00
1937	815.42
1938	86.50
PATRICIA DISSTON	
1936	$300.00
1937	815.41
1938	86.50

2. From the said income of each of the said three trusts the trustees made the following payments during the years 1936, 1937, and 1938 for the said three minor beneficiaries:

57a WILLIAM L. DISSTON (who became of age on April 12, 1938)

1936	
Commission to trustees	$6.00
To Dorothea D. Disston, beneficiary's mother	288.00
1937	
Commission to trustees	38.40
To Dorothea D. Disston, mother of beneficiary	94.68
Safe deposit box rent	4.40
Personal property tax	3.92
1938	
To William L. Disston, beneficiary	300.17
Safe deposit box rent	2.20
Personal property tax	3.49

On May 4, 1937, a check in the amount of $72.00 was drawn and sent to Dorothea D. Disston but was by her returned to the corporate trustee. Said check was cancelled on June 3, 1937.

On July 8, 1937, a check in the amount of $216.00 was drawn and sent to Dorothea D. Disston but was by her returned to the corporate trustee. Said check was cancelled on July 12, 1937.

RACHEL ELIZABETH DISSTON

1936

Commission to trustees	$6.00
To Dorothea D. Disston, mother of beneficiary	288.00

1937

Commission to trustees	38.40
To Dorothea D. Disston, mother of beneficiary	94.68
Safe deposit box rent	4.40
Personal property tax	3.92

1938

Safe deposit box rent	2.20
Personal property tax	3.49

58a On May 4, 1937, a check in the amount of $72.00 was drawn and sent to Dorothea D. Disston but was by her returned to the corporate trustee. Said check was cancelled on June 3, 1937.

On July 8, 1937, a check in the amount of $216.00 was drawn and sent to Dorothea D. Disston but was by her returned to the corporate trustee. Said check was cancelled on July 12, 1937.

PATRICIA DISSTON

1936

Commission to trustees	$6.00
To Dorothea D. Disston, mother of beneficiary	288.00

1937

Commission to trustees	38.40
To Dorothea D. Disston, mother of beneficiary	94.68
Safe deposit box rent	4.40
Personal property tax	3.92

1938

Safe deposit box rent	2.20
Personal property tax	3.49

On May 4, 1937, a check in the amount of $72.00 was drawn and sent to Dorothea D. Disston but was by her returned to the corporate trustee. Said check was cancelled on June 3, 1937.

On July 8, 1937, a check in the amount of $216.00 was drawn

and sent to Dorothea D. Disston but was by her returned to the corporate trustee. Said check was cancelled on July 12, 1937.

3. Under date of June 2, 1937, Deborah Disston, one of the individual trustees under deed of trust dated December 17, 1936, wrote a letter to a Mr. Webb, an employee in the trust department of Liberty Title and Trust Company, corporate trustee thereunder, a copy of which is as follows:

59a "JUNE 2, 1937.

"DEAR MR. WEBB: Would you please pay out any checks that have accumulated for Dorothea D. James and Deborah Disston from the Trust Fund of William D. Disston; and in the future, instead of holding the money to be paid quarterly please send out the checks as soon as you receive them. The money for the minor children, William L. Disston, Rachel Elizabeth Disston, and Patricia Disston is to be accumulated and held for them until they become of age.

"Sincerely,

"DEBORAH DISSTON,
"*Individual Trustee, Sec.*"

4. After 1937 the income of the trust for the minor beneficiary Rachel Elizabeth Disston was accumulated until she attained her majority.

5. After 1937 the income of the trust for the minor beneficiary Patricia Disston has been accumulated.

6. The corpus of the trust created by deed of trust dated December 9, 1938, consisted solely of entirely unimproved real estate. There has been no net income therefrom.

HAROLD EVANS,
Counsel for Petitioner.
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

60a In the Tax Court of the United States

Excerpt from transcript of hearing September 14, 1942

(Docket Nos. 109985–110630)

"Mr. EVANS. * * * In addition to the facts covered by the stipulation, Mr. Brown is also willing to stipulate that the 1936 gift tax return of the Petitioner was filed on March 12, 1937.

"Mr. BROWN. So agreed."

In the Tax Court of the United States

Memorandum opinion

(Docket Nos. 109985, 110630)

Rendered February 4, 1943

HILL, Judge. The Commissioner determined deficiencies in gift tax as follows:

Docket No.	Year	Amount
109985	1937	$644.48
110630	1938	1,430.08

In determining the deficiencies respondent disallowed three $5,000 exclusions for 1937 and two for 1938 upon the ground that the gifts made were of a future and not a present interest. He also adjusted the total net gifts in prior years by disallowing three $5,000 exemptions for 1936.

The first issue is whether or not certain gifts in trust are gifts of future interests. If we so determine a second issue arises. This issue is whether or not the respondent can determine the deficiencies for the taxable years by readjusting the year 1936. The facts were all stipulated and as stipulated are adopted as our findings of fact. Only those deemed necessary to an understanding of the issues involved will be set forth herein.

Petitioner is an individual residing at 8840 Norwood Ave-
61a nue, Philadelphia, Pa. The gift tax returns for the periods here involved were filed with the collector of internal revenue for the first district of Pennsylvania.

By deed dated December 17, 1936, petitioner transferred certain property in trust to Liberty Title and Trust Company, et al, trustees. The trusts were created for the benefit of his five children. The trust instrument provided in part:

Second. Terms of the Trust: Trustees shall divide the principal of the trust into five equal shares and shall hold, manage, invest, and reinvest the principal of said shares in accordance with the powers hereinafter granted, In Trust, Nevertheless, as follows:

* * * * *

4. As to the fourth of said equal shares of principal, to accumulate the net income therefrom for the benefit of Rachel Elizabeth Disston until she reaches the age of twenty-one years, at which time to pay over to her all accumulated income and thereafter to pay over to her in not less than quarterly instalments the entire net income derived therefrom during her lifetime; * * *

* * * * *

6. Trustees shall hold the shares of minors in whom the principal shall have vested during their respective minorities, and during such time shall apply such income therefrom as may be necessary for the education, comfort, and support of the respective minors, and shall accumulate for each minor until he or she reaches the age of twenty-one years, all income not so needed. The foregoing clause shall apply to minor children of the Settlor irrespective of the direction heretofore set forth to accumulate all income for such minors. * * *

Substantially the same provisions in regard to petitioner's son, William L. Disston, and his daughter, Patricia Disston,
62a were incorporated in the trust instrument, hereinafter surnames will be omitted. William L. was born April 12, 1917; Rachel Elizabeth, May 2, 1919; and Patricia, February 23, 1924.

Petitioner filed a gift tax return for 1936 on March 12, 1937. This return was audited by respondent and after making minor adjustments in petitioner's gift tax liability as reported in the return, respondent determined that during the year 1936 petitioner had made gifts aggregating $71,952.49. These gifts included the above trust and one to his wife. Respondent allowed exemptions of $5,000 for each of the six donees and an exemption of $40,000. The net gifts were $1,952.49 and petitioner paid the tax thereon.

On March 21, 1937, petitioner added to the trust 500 shares of capital stock of Henry Disston & Sons having a value of $25,000. Shares having a value of $5,000 were transferred to the trust for each of petitioner's five children.

By deed of trust dated December 9, 1938, petitioner conveyed to Dorothea D. James, and others, trustees, two tracts of land valued at $38,581.54. This trust instrument provided for the creation of a trust for the benefit of each of petitioner's five children. The provisions as to Rachel Elizabeth and Patricia, minors, were substantially the same, if not identical, with those of the trust instrument of December 17, 1936.

The first issue which we must determine is whether or not the gifts in trust to the minors were of a present or future interest. Petitioner contends that those cases [1] which hold that gifts in trust are of a future interest where the trustees have discretion are not controlling here because the trustees had to distribute "such income therefrom as may be necessary for the education, comfort, and support of the respective minors." Someone must determine
63a what, if anything, is necessary. The trustees are the logical ones to so determine. We do not deem this clause any more compelling upon the trustees in this case than the discre-

[1] Commissioner v. Taylor, 122 Fed. (2d) 714; Welch v. Paine, 120 Fed. (2d) 141; Annie B. Smith, 45 B. T. A. 948 (on appeal, C. C. A. 8th).

tionary power vested in them in Lillian Seeligson Winterbotham, 46 B. T. A. 972. Moreover, the minors would not be entitled to any distribution until it became necessary for their education, comfort, or support. We would be unable to determine the value of such a right. See Helvering v. Blair, 121 Fed. (2d) 945. Since all of the interests created under both of the trust instruments were substantially similar, all must be held to be gifts of a future interest insofar as the minor beneficiaries are concerned. Thus, respondent's determination was not in error.

The second issue is whether or not respondent may now adjust for the purpose of determining net gifts in prior years the year 1936 which he admits is closed by the statute of limitations. However, he has not determined a deficiency for that year but is merely disallowing some $5,000 exemptions which he erroneously allowed in the computation of the gift tax for 1936. Petitioner admits that we have previously considered this same issue and ruled against him. Lillian Seeligson Winterbotham, supra. He contends, however, that that holding was in error and that it should now be overruled. However, we are of the opinion that our holding therein was correct and we therefore follow that case. Thus, the deficiencies determined by respondent are correct.

Decisions will be entered under Rule 50.

64a In the Tax Court of the United States

Decision

(Docket No. 109985)

Entered March 15, 1943

Pursuant to the memorandum opinion of the Court entered on February 4, 1943, the respondent herein on February 26, 1943 filed a recomputation of tax, and on March 12, 1943 the petitioner filed an agreement to such recomputation. Therefore, it is

Ordered and decided: That there is a deficiency in gift tax for the calendar year 1937 in the amount of $644.48.

(S) SAM B. HILL, *Judge.*

In the Tax Court of the United States

Decision

(Docket No. 110630)

Entered March 15, 1943

Pursuant to the memorandum opinion of the Court entered on February 4, 1943, the respondent herein on February 26, 1943

filed a recomputation of tax, and on March 12, 1943 the petitioner filed an agreement to such recomputation. Therefore, it is

Ordered and decided: That there is a deficiency in gift tax for the calendar year 1938 in the amount of $1,430.08.

(Signed) SAM B. HILL, *Judge.*

65a In the Tax Court of the United States

Petition for review by the United States Circuit Court of Appeals for the Third Circuit

Filed June 8, 1943

(Docket Nos. 109985 and 110630)

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Third Circuit:

I

JURISDICTION

William D. Disston, your petitioner, by his attorney, Harold Evans, respectively petitions this Court to review the decisions of The Tax Court of the United States (formerly the United States Board of Tax Appeals) entered on March 15, 1943, and finding a deficiency in gift tax due from your petitioner for the calendar year 1937 in the amount of $644.48 (Docket No. 109985) and for the calendar year 1938 in the amount of $1,430.08 (Docket No. 110630).

Your petitioner at the time of filing this petition is a citizen of the United States and resides at 8840 Norwood Avenue, Philadelphia, Pennsylvania.

The returns of gift tax in respect of which the aforementioned tax liabilities arose were filed by your petitioner with the Collector of Internal Revenue for the First Collection District of Pennsylvania, located in the City of Philadelphia, State of Pennsylvania, which is located within the jurisdiction of the Circuit Court of Appeals for the Third Circuit.

Jurisdiction in this Court to review the decisions of The Tax Court of the United States, aforesaid, is founded on Section 1141 of the Internal Revenue Code.

66a

II

Nature of Controversy

By deed dated December 17, 1936, petitioner created five trusts, one for the benefit of each of his five children, three of whom were minors. The Commissioner of Internal Revenue in due course determined petitioner's gift tax liability for 1936 and allowed five exclusions (one on account of the trust for each child). In 1937 petitioner made additions to each trust. He duly filed a gift tax return for 1937 in which he claimed five exclusions. By deed dated December 9, 1938, petitioner created five trusts, one for the benefit of each of his five children, two of whom were then minors. Petitioner duly filed a gift tax return for 1938 in which he again claimed five exclusions.

The Commissioner of Internal Revenue did not question petitioner's right to deduct the exclusions claimed on his gift tax returns for 1936, 1937 and 1938 until the year 1941 when for the first time he contended that petitioner was not entitled to any exclusions on account of the gifts in trust for the benefit of petitioner's minor children, on the ground that the gifts in trust for such minors were gifts of future interests, and assessed deficiencies for the years 1937 and 1938 (the statute of limitations having barred any assessment for the year 1936). Petitioner contends that the gifts were gifts of present interests and that he is entitled to the exclusions claimed on his return.

Even if the gifts in trust were gifts of future interests petitioner contends that the Commissioner of Internal Revenue is without authority to recompute petitioner's net gifts for the year 1936 in order to increase the deficiencies for the years 1937 and 1938.

The Tax Court of the United States held:

(1) That the gifts in trust were gifts of future interests in so far as the minor beneficiaries were concerned.

(2) That the Commissioner of Internal Revenue could in 1941, for the purpose of increasing the deficiencies for
67a the years 1937 and 1938, adjust the exclusions for the year 1936, a year which was then closed by the Statute of Limitations.

III

Assignment of Errors

In making its decision as aforesaid, The Tax Court of the United States committed the following errors upon which your petitioner relies as the basis of this proceeding:

(1) The Court erred in finding that the gifts made to the trusts for minors in 1936 were gifts of future interests.

(2) The Court erred in finding that the gifts made to the trusts for minors in 1937 were gifts of future interests.

(3) The Court erred in finding that the gifts made to the trusts for minors in 1938 were gifts of future interests.

(4) The Court erred in not allowing an exclusion on account of the gift in trust to each minor child in 1936.

(5) The Court erred in not allowing an exclusion on account of the gift in trust to each minor child in 1937.

(6) The Court erred in not allowing an exclusion on account of the gift in trust to each minor child in 1938.

(7) The Court erred in holding that the Commissioner of Internal Revenue might recompute the amount of petitioner's net gifts in the year 1936, a year which it is admitted is closed by the Statute of Limitations, for the purpose of determining greater deficiencies for the years 1937 and 1938.

Wherefore your petitioner prays that this Court may review the decisions and orders of The Tax Court of the United States and reverse and set aside the same and direct the entry of decisions by said Court in favor of petitioner determining that there is no deficiency in gift taxes for the years 1937 and 1938, due
68a from petitioner; and for the entry of such further orders and directions as shall by this Court be deemed meet and proper, in accordance with law.

HAROLD EVANS,
Attorney for Petitioner,
1000 Provident Trust Building, Philadelphia, Pa.

[*Duly sworn to by Harold Evans; jurat omitted in printing.*]

69a In the Tax Court of the United States

Notice of filing petition for review

Filed June 9, 1943

(Docket Nos. 109985 and 110630)

To J. P. WENCHEL, *Chief Counsel, Bureau of Internal Revenue.*

You are hereby notified that William D. Disston did, on the 8th day of June 1943, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Third Circuit, of the decision of this Court heretofore rendered in the above-

entitled case. Copy of the petition for review as filed is hereto attached and served upon you.

Dated this 8th day of June 1943.

B. D. GAMBLE,
Clerk, The Tax Court of the United States.

Service of copy of petition for review acknowledged this 9th June 1943.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

71 In the United States Court of Appeals for the Third Circuit

No. 8440—October Term, 1943

WILLIAM D. DISSTON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

And afterwards, to wit, 19th day of November 1943, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris, and Honorable Charles Alvin Jones, Circuit Judges, and the court not being fully advised in the premiess, takes further time for the consideration thereof.

Order directing reargument

Ordered that the above-entitled case be restored to the argument list and set down for reargument before the court en banc on Friday, Februafy 25, 1944.

February 7, 1944.

By the Court.

JONES, *Circuit Judge.*

And afterwards, to wit, the 25th day of February 1944, come the parties aforesaid by their counsel aforesaid, and this case being called for reargument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable Albert B. Maris, Honorable Charles Alvin Jones, Honorable Herbert F. Goodrich, and Honorable Gerald McLaughlin, Circuit Judges, and the court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 12th day of July 1944, come the parties aforesaid by their counsel aforesaid, and the court, now being fully advised in the premises, renders the following decision:

72 In United States Circuit Court of Appeals for the Third Circuit

No. 8440—October Term, 1943

WILLIAM D. DISSTON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition to Review the Decision of the Tax Court of the United States

Before BIGGS, MARIS, JONES, GOODRICH, and MCLAUGHLIN, Circuit Judges

Opinion of the court

Filed July 12, 1944

By JONES, Circuit Judge.

The principal question here involved is whether gifts which the petitioner made to his minor children in the taxable years in question were gifts of future interests within the purview of Sect. 504 (b) of the Revenue Act of 1932[1] and, therefore, not entitled to the specific exclusion allowed by the statute. If that be answered in the affirmative, then a further question becomes pertinent. Was it proper for the Commissioner of Internal Revenue, in computing the petitioner's gift tax liability for the taxable years in question, to readjust and disallow exclusions theretofore allowed for gifts which the taxpayer had made to his minor children in a prior year as to which year the statute of limitations had run so far as the determination and assessment of a deficiency in tax for that year was concerned?

The facts are undisputed and show the following situation.

On December 17, 1936, the taxpayer created a trust for the benefit of each of his five children, three of whom were then minors. By the trust indenture, he appointed a trust company and his two adult children as trustees. He also made an outright gift

[1] For the purpose of computing the gift tax under the Revenue Act of 1932, c. 209, 45 Stat. 169, Sec. 504 (b), provides that—
"* * * In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such persons shall not, for the purposes of subsection (a) [which defines "net gifts"], be included in the total amount of gifts made during such year."

to his wife in that year. The taxpayer filed a gift tax return for the year 1936 which was duly audited and from which it was determined that he had made gifts in that year to his wife and his five children in an aggregate sum of $71,952.49. The Commissioner allowed six exclusions of $5,000 each (one on account of the gift to the wife and one on account of the gift to each of the five children) and an exemption of $40,000. The
73 taxpayer's net gifts for the year 1936 were accordingly determined to be $1,952.49 upon which a tax was duly assessed and paid.

On March 21, 1937, the taxpayer augmented the corpus of the trust for his five children by adding thereto $5,000 for each child (in the form of shares of stock in a company in which he was interested). At that time three of the children were still minors.

On December 9, 1938, the taxpayer created another trust for the benefit of his five children, the corpus whereof consisted of two tracts of unimproved land valued at $38,581.54. At that time two of the taxpayer's children were still minors, one of the former minors having attained his majority on April 12, 1938. The trustees were the same corporate trustee and the three adult beneficiaries.

The Commissioner disallowed exclusions in the case of the taxpayer's gifts to his three minor children in 1937 on the ground that they constituted gifts of future interests within the intent of Sec. 504 (b). And, for like reason, he also disallowed exclusions on the gifts to the two minor children in 1938. In computing the taxpayer's net gifts in 1937 and 1938, subject to tax, the Commissioner also readjusted the taxpayer's gift tax return for 1936 by disallowing the exclusions therein allowed on account of the gifts to the minor children in that year, as to which the statute of limitations had run. The Tax Court sustained the Commissioner's determination and the present petition for review followed.

The 1936 and 1938 trust instruments do not differ materially so far as the interests given the minors and the powers conferred on the trustees are concerned. Only typical pertinent provisions need, therefore, be quoted.

As to the gift to a minor, paragraph Second, subparagraph 3, of the 1936 trust instrument provided:

"3. As to the third of said equal shares of principal, to accumulate the net income therefrom for the benefit of William L. Disston until he reaches the age of twenty-one years, at which time to pay over to him all accumulated income, and thereafter to pay over to him in not less than quarterly instalments the entire net income derived therefrom during his lifetime; provided, however, that upon his reaching the age of forty-five years one-half of the principal of his share shall be paid over to him free and discharged of

all trusts; and upon further trust upon his death whether before or after reaching the age of forty-five years, to divide the principal of his share, or such portion thereof as is then held by the Trustees, among his then living descendants (including children, if any, legally adopted by him or his descendants) in such
74 amounts as he shall by will appoint, and in default of such appointment, to divide the same equally per stirpes among such of his said descendants as are living at the time of such distribution, and in default of such descendants then living, to divide the principal equally per stirpes among such of Settlor's other children and their descendants (including children, if any, legally adopted by any of them) as are then living; provided, however, that if said son shall die before reaching the age of forty-five years, the said powers of appointment shall be subject to the right of the said son to appoint to his wife during her lifetime or for any shorter period such portion of the annual net income from his share of principal as he may elect, not to exceed, however, one-half of such income."

The gifts to the other two minors (daughter) were in the same terms as the above except that each of the minor daughters was to receive one-third, instead of one-half, of the principal of her gift upon reaching the age of forty-five.

As to the trustees' powers with respect to the gifts to the minors, paragraph Second, subparagraph 6, provided as follows:

"6. Trustees shall hold the shares of minors in whom the principal shall have vested during their respective minorities, and during such time shall apply such income therefrom as may be necessary for the education, comfort, and support of the respective minors, and shall accumulate for each minor until he or she reaches the age of twenty-one years, all income not so needed. The foregoing clause shall apply to minor children of the Settlor irrespective of of the direction heretofore set forth to accumulate all income for such minors. In the administration of the shares of the minors, the Trustees shall have all of the powers, duties, and discretions, including the power of investment and reinvestment, as are conferred upon them as Trustees hereunder."

Paragraph Fourth, subparagraph 7, further directed the trustees—

"7. To apply the income to which any beneficiary shall be entitled hereunder for the maintenance, education, and support of such beneficiary should he or she by reason of age, illness, or any other cause in the opinion of the Trustees be incapable of dispensing it. Payment by the Trustees to the parent of any minor or to the person with whom such minor resides and the receipt of such parent or such person shall be sufficient acquittance and discharge to the Trustees for such payment or payments."

The gifts to the donor's adult children were likewise subject to the trust but, as to such beneficiaries, there was no provision as to the accumulation of their shares in the income, the same being payable to them currently.

As the trust instruments disclose, the gifts to the minor children were immediate, definite, absolute, and irrevocable. In no
75 respect did they depend upon the happening of an uncertain future event either for the determination of the donees or the quantum of the gifts. It seems plain, therefore, that the gifts did not constitute transfers of future interests.

In United States v. Pelzer, 312 U. S. 399, 403, the present Chief Justice, in construing Sec. 504 (b) of the Revenue Act of 1932, said that the phrase "future interests" was plainly not concerned with varying local definitions of property interests or local refinements of conveyancing and that the "purpose which marks the boundaries of the statutory command" was "the protection of the revenue and the appropriate administration of the tax immunity provided by the statute." Justice Stone then quoted from committee reports in support of the legislation (H. Rept. No. 708, 72d Cong., 1st Sess., p. 29; S. Rept. No. 665, 72d Cong., 1st Sess., p. 41) to the effect that—

"The term 'future interests in property' refers to any interest or estate, whether vested or contingent, limited to commence in possession or enjoyment at a future date. The exemption being available only in so far as the donees are ascertainable, the denial of the exemption in the case of gifts of future interests is dictated by the apprehended difficulty, in many instances, of determining the number of eventual donees and the values of their respective gifts."

Art. 11 of Treasury Regulations 79 (1936 ed.), interpreting Sec. 504 (b), declared that "future interests in property" should be taken to include "reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are *limited to commence in use, possession, or enjoyment at some future date or time.* * * *" [Italics supplied.] In the Pelzer case the Supreme Court said (p. 404) that, as applied to the facts of that case, this regulation was within the competence of the Treasury to promulgate.

Applying the foregoing tests to the facts of the Pelzer case, the Supreme Court held the gifts there, which were limited to the settlor's minor grandchildren who should reach the age of twenty-one after a ten year accumulation period, were of "future interests." In short, the gifts in that case depended upon the happening of uncertain future events. Consequently, the Supreme Court said (p. 404), that "The gift thus involved the difficulties of

determining the 'number of eventual donees and the value of their respective gifts' which it was the purpose of the statute to avoid." Likewise, in Ryerson v. United States, 312 U. S. 405, where again the gifts were upon contingencies which might never happen, they were held to be gifts of future interests. By direct contrast, the gifts to the minor in the instant case, which
76 were immediate and absolute, when made, and did not depend upon the donees' survivorship or the happening of any uncertain future event, were gifts of present interests. The donor was, therefore, entitled to the specific exclusions allowed by the Act on his gifts to his minor children unless the provisions which he made as to the accumulation of the income during the donees' minority and the trustees' discretionary use thereof for the donees' benefit during their legal disability served to render the gifts "future interests." We do not think that they did.

The provision for the accumulation of income affected neither the identity of the minor donees nor the value of the gifts. At most, the provision was but compliant recognition by the donor of what the law, out of its solicitude for the safeguarding of a minor's property, would have interposed in the absence of the donor's express direction in such regard. The gifts were the property of the minor donees none the less; and so was the income which recurrently accrued thereon even though it was to be accumulated during the donees' minority. No one else had any interest in or to the gift or the income therefrom. Nor could any interest therein be acquired by anyone else except through the donees. If the donees should die during their minority, the gifts and all accumulated income would pass as part of their respective estates. The use and enjoyment of the gifts were the minors' from the day the gifts were made. The accumulated income inured alone to their benefit. Furthermore, for the purpose of determining the recipients of the gifts, the possession of the corpus was in the minor donees within the contemplation of the relevant provision of the Revenue Act. See Helvering v. Hutchings, 312 U. S. 393, 396, where the Supreme Court said that "the beneficiary of the trust to whose benefit the surrender [by the donor] inures * * * is the 'person' or 'individual' to whom the gift is made." In the test laid down by Art. 11 of Regulation 79 for determining a future interest, the terms, "use, possession, or enjoyment," are used disjunctively. A present possession of an absolute and irrevocable gift is not, therefore, to be submerged by a supposed lack of use or enjoyment which, in turn, rests upon no more than that the income is accumulated for the minor beneficiary during his minority rather than paid directly into his hands.

In the instant case the Commissioner concedes that the donor was entitled to specific exclusions on account of his gifts to his

adult children. Yet, those gifts were subject to the same trust as were the gifts to the minor children. The surrender of ownership by the donor of the subject matter of the gifts and the investiture of the donees therewith was just as certain and definite in the case of the minors as it was in the case of the adults. If, 77 therefore, a distinction should be drawn between the gifts to the adult and to the minor children because the income from the gifts to the latter was to be accumulated during their legal disability, it would mean that a donor would never be entitled to an exclusion on an equally absolute and irrevocable gift to a minor. We can find nothing in the statute or in its evident purpose (United States v. Pelzer, supra) to warrant imputing to Congress an intent to penalize gifts to minors merely because the legal disability of their years precludes them for a time from receiving their income in hand currently. See dissenting opinion of Judge Waller in Fondern v. Commissioner, — Fed. 2d —, — (C. C. A. 5), decided March 3, 1944.

Nor did the authority to the trustees to use, in their sole discretion, the income from the gifts to the minors for their support and education during minority make the income from the gifts any less the minors' property. The discretion was sole only in that it was for the trustees alone to exercise. But, that did not mean that the trustees might exercise the discretion arbitrarily or capriciously. The discretion was a legal one and, therefore, reviewable by a court of competent jurisdiction for an abuse of its exercise. The discretion thus reposed neither added to nor took away from the absoluteness of the gifts. The same may be said for the letter which one of the individual trustees wrote to the corporate trustee directing the latter to accumulate the income from the gifts to the minors. That letter evidenced no more than the individual trustee's exercise of her discretion and was wholly without effect so far as the minor beneficiaries' right to the income, even through accumulated, was concerned.

In our opinion an immediate and irrevocable gift to a minor in trust, not dependent for its consummation or continuation upon the happening of uncertain future events, constitutes a transfer of a present interest notwithstanding that the deed of gift provides for the accumulation of the income during the beneficiary's minority and authorizes the use thereof by the trustees, in their sole discretion, for the beneficiary's support and education during minority. Commissioner v. Taylor, 122 F. 2d 714 (C. C. A. 3) is, therefore, to be taken as overruled. It follows that the taxpayer in the instant case was entitled, on account of his gifts to his minor children, to the specific exclusions allowed by the Revenue Act. This conclusion makes it unnecessary for us to consider or pass upon the Commissioner's action in disallowing ex-

clusions on gifts made in a prior year when computing the taxpayer's net gifts in the years involved in the present proceeding.

The decision of the Tax Court is reversed.

Dissenting opinion

BIGGS, Circuit Judge, dissenting.

78 I dissent. It is clear that the gifts to the minor beneficiaries are, in part, at least, gifts of future interests within the meaning of Section 504 (b) of the Revenue Act of 1932. The indentures provide that the income unexpended for the immediate benefit of the minors shall be accumulated for their future[2] enjoyment when they reach their respective majorities. If one of the cestuis should die before reaching the age of twenty-one years, the accumulation for his benefit could not pass to his administrator for the indentures create spendthrift trusts.[3] If the accumulation passed to an administrator it would become liable to the deceased minor's debts and the purpose of the grantor in creating the spendthrift trusts would be destroyed. See Huber's Appeal, 80 Pa., 348, 359.[4] Gifts of future interests were never clearer.

The Tax Court assimilates the facts of the case at bar to those of cases of discretionary trusts such as that discussed in Lillian Seeligson Winterbotham, 46 B. T. A. 972. The majority of this court take the view that the trustees are compelled to expend the income of the trusts for education, comfort, and support of the minors and that therefore the gifts are of present interests. Taking the position of the majority to its extreme logical limit and conceding that income to be used for the immediate benefit of the minor cestuis constitutes a gift of a present interest, we find a future interest and a present interest embraced in the trusts. As the Tax Court points out, the trustees are the judges (in the first instance) of how much of the income from the gift is to be expended for the immediate benefit of the minors. That amount might be much or little as justified by the circumstances of the particular minor involved and it is impossible to determine the value of the present right or even to allocate it to the first $5000 in value of the gift. See Helvering v. Blair, 121 F. 2d 945, 947.

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[1] See the definition of the term "future interests in property" contained in the committee reports recommending the legislation: H. Rept. No. 708, 72d Cong., 1st Sess., p. 29; S. Rept. No. 665, 72d Cong., 1st Sess., p. 41.

[2] See the "Protective Clause," paragraph "Third" of both indentures.

[3] The majority consider the accumulation provisions of the trusts as "* * * but compliant recognition by the donor of what the law, out of its solicitude for the safeguarding of a minor's property, would have interposed in the absence of the donor's express direction in such regard." In my opinion this consideration is not pertinent because a present interest by definition (see that contained in the House and Senate Reports cited in note 1 supra) must be limited to present enjoyment. The question before us under the statute is the nature of the gift "* * * made to any person by the donor during the calendar year * * *"; that is to say, whether the gift embraced a future interest. We are not concerned in the case at bar with what the law of guardianship might do in another case. We are concerned with what the grantor did by the indentures sub judice.

It may be argued that since the right of a minor cestui to the use of the income for his education, comfort and support comes before accumulation and since the income from the first $5,000 in value of the gift might not exceed the requirements of income for these purposes, the gift may be assumed to be one of
79 present interest. Such an assumption, however, scarcely can stand as a basis for evaluating the gift of the present interest for the purpose of taxation.

It follows that I can perceive no sound reason why this court should overrule its decision in Commissioner v. Taylor, 122 F. 2d 714, cert. den. 314 U. S. 699.

As to the second point raised by the petitioner I think it is clear that the statute of limitations does not preclude the reduction of the $40,000 specific exemption on account of gifts made in a previous barred year even though such gifts were not taxed in the earlier year. See Greenlead Textile Corp. v. Commissioner, 26 B. T. A. 727, aff'd per curiam 65 F. 2d 1017, and Lord Forres v. Commissioner, 25 B. T. A. 154. See also Treasury Regulations 79 (1936 ed.), Article 5.

In my opinion the decision of the Tax Court should be affirmed.

In United States Circuit Court of Appeals

Judgment

This cause came on to be heard on the transcript of record from the Tax Court of the United States and was argued by counsel.

On consideration whereof, it is nowhere ordered, adjudged, and decreed by this court that the decision of the said Tax Court of the United States in this cause be, and the same is hereby reversed.

By the Court.

JONES, *Circuit Judge.*

JULY 12, 1944.

[Endorsements:] Order reversing decision of U. S. Tax Court received and filed July 12, 1944. Wm. P. Rowland, Clerk.

In United States Circuit Court of Appeals

Order amending opinion

And now, to wit, July 27, 1944, it is ordered and directed that the opinion filed for this court in the above-entitled matter on July 12, 1944, be amended by striking out the last full sentence at the bottom of page 8 of the printed opinion which reads as follows:

"The discretion thus reposed neither added to nor took away from the absoluteness of the gifts."

and by substituting therefor the following:

"The discretion thus reposed took nothing away from the absoluteness of the gifts."

By the Court.

JONES, *Circuit Judge.*

80 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, Third Judicial Circuit, ss:

I, Wm. P. Rowland, clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Petitioner's brief, as constituting the portions of the record before this court at argument; and proceedings in this court in the case of William D. Disston, Petitioner, vs. Commissioner of Internal Revenue, Respondent, No. 8440, in file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 15th day of September in the year of our Lord one thousand nine hundred and forty-four and of the Independence of the United States the one hundred and sixty-ninth.

[SEAL] WM. P. ROWLAND,
Clerk, U. S. Circuit Court of Appeals, Third Circuit.

81 Supreme Court of the United States

Order allowing certiorari

Filed February 5, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE : 1945

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CITATIONS

612501—44

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. —

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILLIAM D. DISSTON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit entered in this case.

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 60–63) and the opinion of the Circuit Court of Appeals (R. 72–79) have not been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 12, 1944 (R. 79). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether gifts in trust for taxpayer's minor children were gifts of future interests within Section 504 (b) of the Revenue Act of 1932, and hence to be included in taxpayer's net gifts.

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 502. COMPUTATION OF TAX.

The tax for each calendar year shall be an amount equal to the excess of—

(1) a tax, computed in accordance with the Rate Schedule hereinafter set forth, on the aggregate sum of the net gifts for such calendar year and for each of the preceding calendar years, over

(2) a tax, computed in accordance with the Rate Schedule, on the aggregate sum of the net gifts for each of the preceding calendar years.

* * * * *

SEC. 504. NET GIFTS.

(a) *General Definition.*—The term "net gifts" means the total amount of gifts made during the calendar year, less the deductions provided in section 505.

(b) *Gifts Less Than $5,000.*—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included

in the total amount of gifts made during such year.

* * * * *

Treasury Regulations 79 (1936 ed.):

ART. 9. *Net gifts.*—The tax is computed upon the amount of the donor's net gifts (see articles 5, 6, and 7). The term "net gifts" means the "total amount of gifts" computed as provided in section 504 (see article 10), less the deductions provided in section 505. (See articles 12 and 13.)

* * * * *

ART. 11. *Future interests in property.*—No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. "Future interests" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time. * * *

STATEMENT

The facts, as stipulated and found by the Tax Court, are not in dispute. They may be summarized as follows:

By deed dated December 17, 1936, the taxpayer created a trust for the benefit of each of his five children, three of whom were then minors (R. 27). In auditing the taxpayer's gift tax return for

the year 1936, the Commissioner determined that the taxpayer had made gifts in that year to his wife and children in an aggregate amount of $71,952.49 (R. 27).

The Commissioner allowed the taxpayer an exclusion of $5,000 on each gift to his five children and on the gift to his wife. The taxpayer's net gifts for the year 1936, after deducting an exemption of $40,000, were accordingly computed to be $1,952.49, upon which a tax was duly assessed and paid (R. 28).

On March 21, 1937, the taxpayer augmented the corpus of the trust by transferring to the trustees 500 shares of stock having an aggregate value of $25,000 (R. 28). Upon receipt of this stock the trustees allocated 100 shares, having a value of $5,000, to each of the taxpayer's five children, three of whom were still minors (R. 28). On December 9, 1938, the taxpayer created another trust for the benefit of each of his five children, the corpus consisting of two tracts of land worth $38,581.54 (R. 28). When the 1938 trust was established, two of the taxpayer's children were still minors.

The terms of the two trusts were substantially identical in their provisions for each of the taxpayer's minor children. The trust instrument of December 17, 1936, provided, in part, as follows (R. 29, 31, 33, 34, 36–37):

SECOND. Terms of the Trust: Trustees shall divide the principal of the trust into five equal shares and shall hold, manage, invest and reinvest the principal of said shares in accordance with the powers hereinafter granted, IN TRUST, NEVERTHELESS, as follows:

* * * * * *

3. As to the third of said equal shares of principal, to accumulate the net income therefrom for the benefit of WILLIAM L. DISSTON until he reaches the age of twenty-one years, at which time to pay over to him all accumulated income, and thereafter to pay over to him in not less than quarterly instalments the entire net income derived therefrom during his lifetime; provided, however, that upon his reaching the age of forty-five years one-half of the principal of his share shall be paid over to him free and discharged of all trusts; * * *.

* * * * * *

6. Trustees shall hold the shares of minors in whom the principal shall have vested during their respective minorities, and during such time shall apply such income therefrom as may be necessary for the education, comfort and support of the respective minors, and shall accumulate for each minor until he or she reaches the age of twenty-one years, all income not so needed. The foregoing clause shall apply to minor children of the Settlor irrespective of the direction heretofore set forth to

accumulate all income for such minors. In the administration of the shares of the minors, the Trustees shall have all of the powers, duties and discretions, including the power of investment and reinvestment, as are conferred upon them as Trustees hereunder.

* * * * *

FOURTH. Trustees' Powers: * * *

7. To apply the income to which any beneficiary shall be entitled hereunder for the maintenance, education and support of such beneficiary should he or she by reason of age, illness or any other cause in the opinion of the Trustees be incapable of dispensing it. Payment by the Trustees to the parent of any minor or to the person with whom such minor resides and the receipt of such parent or such person shall be sufficient acquittance and discharge to the Trustees for such payment or payments.

* * * * *

Partial payments of income from the 1936 trust were made to the parent of the minor beneficiaries in each of the years 1936, 1937, and 1938 (R. 56-58). At the time the case was before the Tax Court, there had been no net income from the 1938 trust (R. 59). In 1937, checks representing trust income were sent by the corporate trustee to the mother of the then minor beneficiaries, but she returned them with instructions to accumulate and hold the income until the children became of

age (R. 57–59). The third child became of age April 12, 1938 (R. 57). After 1937 the trust income for the fourth child was accumulated until she became of age (R. 59). Since 1937 the trust income for the youngest child has been accumulated (R. 59).

In determining the taxpayer's gift tax for the year 1937, the Commissioner disallowed three $5,000 exclusions from taxpayer's net gifts for that year on the ground that the gifts to the three minor children were gifts of future interests (R. 8–9). For the year 1938, the Commissioner disallowed two $5,000 exclusions from taxpayer's net gifts for that year on the ground that the gifts to the two children who were still minors were gifts of future interests (R. 21).

The Tax Court upheld the Commissioner's determinations (R. 63), but its decision was reversed by the Circuit Court of Appeals for the Third Circuit, sitting *en banc* (R. 79). Judge Biggs dissented. In so holding the court below expressly overruled its prior decision in *Commissioner* v. *Taylor*, 122 F. 2d 714, certiorari denied, 314 U. S. 699.

For the purpose of determining the taxpayer's net gifts in prior years the Commissioner adjusted the exclusions which had been allowed for the gifts to the minor children in 1937 (R. 9). At the time this adjustment was made the year 1936 was closed by the statute of limitations (R. 63).

The Tax Court also upheld the Commissioner's determination in this respect (R. 63). In view of its conclusion regarding the principal question, however, the court below did not pass on this question.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred in holding that the gifts to taxpayer's minor children were not gifts of future interests within the meaning of Section 504 (b) of the Revenue Act of 1932, and in reversing the decision of the Tax Court.

REASONS FOR GRANTING THE WRIT

1. The decision below is directly in conflict with rulings of the Circuit Courts of Appeals for the First, Fifth, and Eighth Circuits. *Welch* v. *Paine*, 120 F. 2d 141 (C. C. A. 1st); *Welch* v. *Paine*, 130 F. 2d 990 (C. C. A. 1st); *Fondren* v. *Commissioner*, 141 F. 2d 419 (C. C. A. 5th), in which certiorari was granted October 9, 1944, No. 88, this Term; *French* v. *Commissioner*, 138 F. 2d 254 (C. C. A. 8th). These cases hold that where income is to be accumulated for a beneficiary during his minority and the trustee is directed to or has discretion to apply so much of the income as may be necessary for the education and support of the minor beneficiary, the gift is one of a future interest. The holding of the court below is also inconsistent in principle with *Commissioner* v. *Gardner*, 127 F. 2d 929 (C. C. A. 7th).

2. The construction of the statute made by the court below is contrary to the interpretation embodied in Articles 9 and 11 of Treasury Regulations 79 (1936 ed.), *supra*. The lower court held that where income is to be accumulated for a minor beneficiary, the donor has made as complete a gift as is possible, and that Congress did not intend to discriminate against such gifts merely because the legal disability of the beneficiary prevented present distributions of income. The minority of a beneficiary does not require, however, that his share of the income be accumulated by the trust. See *Fisher* v. *Commissioner*, 132 F. 2d 383 (C. C. A. 9th); and *Kinney* v. *Anglim*, 43 F. Supp. 431 (N. D. Cal.), appeal dismissed on stipulation, 127 F. 2d 291 (C. C. A. 9th), where the trustees were to pay the income to the parents of the minor beneficiaries and the gifts of income were treated as present gifts. In any event, when a donor has made a gift in a particular manner, the nature of the donee's interest under the statute is not dependent upon whether the donor was restricted in his choice of selecting the method by which the gifts should be made. There is no indication that Congress intended to adopt such a criterion of a future interest. See H. Rep. No. 708, 72d Cong., 1st Sess., p. 29 (1939–1 Cum. Bull. (Part 2) 457, 478); S. Rep. No. 665, 72d Cong., 1st Sess., p. 41 (1939–1 Cum. Bull. (Part 2) 496, 526), with respect to the reasons for excluding

gifts of future interests from the exemption. The minor beneficiaries in this case do not have present possession or enjoyment of the complete value of the gift made to them. Since their possession or enjoyment will commence only at a future date, we submit that their interests are future interests within the meaning of the statute.

3. The question presented is important in the administration of the law. Section 1003 (b) (3) of the Internal Revenue Code, as amended by Section 454 of the Revenue Act of 1942, c. 619, 56 Stat. 798 (26 U. S. C. 1940 ed., Supp. III, Sec. 1003), excludes gifts of future interests in property from the $3,000 exemption provided for gifts made during 1943 and subsequent years. Consequently, the problem is likely to recur. The decision below, as pointed out in the dissenting opinion of Judge Biggs, may give rise to serious problems in evaluating the interest of the beneficiary.

CONCLUSION

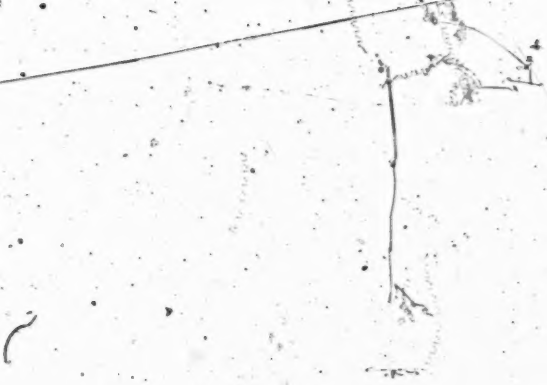
For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

OCTOBER 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944



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CITATIONS

634420—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 589

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

WILLIAM D. DISSTON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Tax Court entered a memorandum opinion (R. 39–41) which is not reported. The opinion of the Circuit Court of Appeals (R. 46–53) is reported at 144 F. 2d 115.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 12, 1944. (R. 53.) The petition for a writ of certiorari was filed on October 12, 1944, and was granted on February 5, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether gifts made by the taxpayer to his minor children under trusts for their benefit were of "future interests in property", and hence not within the $5,000 exclusion provision of Section 504 (b) of the Revenue Act of 1932.

2. Whether the tax liability for the tax years is to be determined by correctly computing the aggregate net gifts made by the taxpayer in prior years, even though the amount of net gifts was erroneously computed in the taxpayer's returns for those years and the tax liability for those years is closed by the statute of limitations.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 502. COMPUTATION OF TAX.
>
> The tax for each calendar year shall be an amount equal to the excess of—
>
> (1) a tax, computed in accordance with the Rate Schedule hereinafter set forth, on the aggregate sum of the net gifts for such calendar year and for each of the preceding calendar years, over
>
> (2) a tax, computed in accordance with the Rate Schedule, on the aggregate sum of the net gifts for each of the preceding calendar years.
>
> * * * * *
>
> SEC. 504. NET GIFTS.
>
> (a) *General Definition.*—The term "net gifts" means the total amount of gifts made

during the calendar year, less the deductions provided in section 505.

(b) *Gifts Less Than $5,000.*—In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first $5,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year.

SEC. 505. DEDUCTIONS. [As amended by Sec. 301 (b) of the Revenue Act of 1935.]

In computing net gifts for any calendar year there shall be allowed as deductions:

(a) *Residents.*—In the case of a citizen or resident—

(1) *Specific exemption.*—An exemption of $40,000, less the aggregate of the amounts claimed and allowed as specific exemption for preceding calendar years.

* * * * * *

Treasury Regulations 79 (1936 ed.):

ART. 9. *Net gifts.*—The tax is computed upon the amount of the donor's net gifts (see articles 5, 6, and 7). The term "net gifts" means the "total amount of gifts" computed as provided in section 504 (see article 10), less the deductions provided in section 505. (See articles 12 and 13.)

ART. 11. *Future interests in property.*—No part of the value of a gift of a future interest may be excluded in determining the total amount of gifts made during the calendar year. "Future interests" is a legal

term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time. * * *

STATEMENT

The facts, as stipulated (R. 16–17, 36–38) and found by the Tax Court (R. 39–40), are not in dispute. They may be summarized as follows:

By deed dated December 17, 1936, the taxpayer created a trust for the benefit of each of his five children, three of whom were then minors. (R. 16–17.) In auditing the taxpayer's gift tax return for the year 1936, the Commissioner determined that the taxpayer had made gifts in that year to his wife and children in an aggregate amount of $71,952.49. (R. 16–17.)

The Commissioner allowed the taxpayer an exclusion of $5,000 on each gift to his five children and on the gift to his wife. The taxpayer's net gifts for the year 1936, after deducting an exemption of $40,000, were accordingly computed to be $1,952.49, upon which a tax was duly assessed and paid. (R. 17.)

On March 21, 1937, the taxpayer augmented the corpus of the trust by transferring to the trustees 500 shares of stock having an aggregate value of $25,000. (R. 17.) Upon receipt of this stock the trustees allocated 100 shares, having a

value of $5,000, to each of the taxpayer's five children, three of whom were still minors. (R. 17.) On December 9, 1938, the taxpayer created another trust for the benefit of each of his five children, the corpus consisting of two tracts of land worth $38,581.54. (R. 17.) When the 1938 trust was established, two of the taxpayer's children were still minors.

The terms of the two trusts were substantially identical in their provisions for each of the taxpayer's minor children. The trust instrument of December 17, 1936, provided, in part, as follows (R. 18–23):

> SECOND: Terms of the Trust: Trustees shall divide the principal of the trust into five equal shares and shall hold, manage, invest and reinvest the principal of said shares in accordance with the powers hereinafter granted, IN TRUST, NEVERTHELESS, as follows:
>
> * * * * *
>
> 3. As to the third of said equal shares of principal, to accumulate the net income therefrom for the benefit of WILLIAM L. DISSTON until he reaches the age of twenty-one years, at which time to pay over to him all accumulated income, and thereafter to pay over to him in not less than quarterly instalments the entire net income derived therefrom during his lifetime; provided, however, that upon his reaching the age of forty-five years one-half of the principal of his share shall be paid

over to him free and discharged of all trusts; * * *

* * * * *

6. Trustees shall hold the shares of minors in whom the principal shall have vested during their respective minorities, and during such time shall apply such income therefrom as may be necessary for the education, comfort and support of the respective minors, and shall accumulate for each minor until he or she reaches the age of twenty-one years, all income not so needed. The foregoing clause shall apply to minor children of the Settlor irrespective of the direction heretofore set forth to accumulate all income for such minors. In the administration of the shares of the minors, the Trustees shall have all of the powers, duties and discretions, including the power of investment and reinvestment, as are conferred upon them as Trustees hereunder.

* * * * *

FOURTH: Trustees' Powers: * * *

* * * * *

7. To apply the income to which any beneficiary shall be entitled hereunder for the maintenance, education and support of such beneficiary should he or she by reason of age, illness or any other cause in the opinion of the Trustees be incapable of dispensing it. Payment by the Trustees to the parent of any minor or to the person with whom such minor resides and the

receipt of such parent or such person shall be sufficient acquittance and discharge to the Trustees for such payment or payments.

* * * * *

Partial payments of income from the 1936 trust were made to the parent of the minor beneficiaries in each of the years 1936, 1937, and 1938. (R. 36–38.) At the time the case was before the Tax Court there had been no net income from the 1938 trust. (R. 38.) In 1937, checks representing trust income were sent by the corporate trustee to the mother of the then minor beneficiaries, but she returned them with instructions to accumulate and hold the income until the children became of age. (R. 37–38.) The third child became of age April 12, 1938. (R. 36.) After 1937 the trust income for the fourth child was accumulated until she became of age. (R. 38.) Since 1937 the trust income for the youngest child has been accumulated. (R. 38.)

In determining the taxpayer's gift tax for the year 1937, the Commissioner disallowed three $5,000 exclusions from taxpayer's net gifts for that year on the ground that the gifts to the three minor children were gifts of future interests. (R. 5–6.) For the year 1938, the Commissioner disallowed two $5,000 exclusions from taxpayer's net gifts for that year on the ground that the gifts to the two children who were still minors were gifts of future interests. (R. 13.)

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The Tax Court upheld the Commissioner's determinations (R. 41), but its decision was reversed by the Circuit Court of Appeals for the Third Circuit, sitting *en banc* (R. 46–53). Judge Biggs dissented. In its opinion the court below expressly overruled its prior decision in *Commissioner* v. *Taylor*, 122 F. 2d 714, certiorari denied, 314 U. S. 699.

For the purpose of determining the taxpayer's net gifts in prior years the Commissioner adjusted the exclusions which had been allowed for the gifts to the minor children in computing the taxpayer's 1936 gift tax. (R. 6.) At the time this adjustment was made the year 1936 was closed by the statute of limitations. (R. 41.)

The Tax Court also upheld the Commissioner's determination in this respect. (R. 41.) In view of its conclusion regarding the principal question, however, the court below did not pass on this question. The dissenting opinion expressed the view that the Commissioner's action was proper. (R. 52–53.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred in holding that the gifts to taxpayer's minor children were not gifts of future interests within the meaning of Section 504 (b) of the Revenue Act of 1932, and in reversing the decision of the Tax Court.

SUMMARY OF ARGUMENT

I

The ruling below rests upon the ground that the gifts to the minor beneficiaries, like those to the adults, were immediately vested, irrevocable, definite, and not uncertain either as to the identity of the donees or the quantum of the gifts. The recent decision of this Court in *Fondren* v. *Commissioner* shows that the reliance of the court below upon these factors was erroneous. The gifts here, as in the *Fondren* case, were limited to commence in enjoyment in the future, both as to principal and income, and hence were gifts of "future interests in property" within the meaning of the statute and the applicable regulations.

The gifts of principal under both trusts in this case are future, since none of the principal can be paid over before the beneficiaries reach 45, except on the earlier future contingencies of illness or emergency. The income cannot be paid over until the beneficiaries reach 21, except for such portions of the income estate as may be necessary before then for their education, comfort and support. The limitations leave open the possibility that the beneficiaries may not need or enjoy the income of these trusts presently.

So far as the trust instruments themselves are concerned, therefore, the gifts of income are of "future interests." To permit an inquiry into the circumstances surrounding the donation, in

order to determine whether the beneficiaries had a present need which might be expected to compel the trustee to distribute all of the trust income currently throughout the accumulation period, would appear to frustrate the evident expectation of Congress that the term "future interests" would, without more, serve as a workable criterion for determining exclusions.

If, however, extraneous circumstances may properly be considered, such circumstances in the present case do not show the gifts of income to be present interests. As to the 1936 trust, there is no showing that the income was presently needed by the beneficiaries when the trust was created; indeed, the evidence is to the contrary. If any part was presently needed, its value is unknown. The gifts made under the 1936 trust in 1937 were undoubtedly future interests, for none of the income was needed after the early part of 1937. No present interests were given in the income of the 1937 trust, for that trust produced no income. If a present interest was given, it had no value.

A gift the enjoyment of which is postponed is a gift of a future interest, whether the gift is made to a minor beneficiary and the postponement is concurrent with his period of incompetence, or whether the gift is made to an adult. To treat such a gift as a future interest in both of these circumstances does not penalize gifts to minors.

but only puts them upon the same basis as gifts to adults. Nothing in the statute indicates that Congress intended to treat them differently.

II

The gift tax liability for 1937 and 1938 is dependent upon the computation of a tax on the aggregate sum of the net gifts for each of the preceding calendar years. The Tax Court correctly held that in determining the gift tax liability for 1937 and 1938 the aggregate sum of the net gifts for each of the preceding calendar years is to be correctly computed, even though the tax paid by the taxpayer in 1936 was based upon an erroneous determination of the amount of net gifts in that year, and the tax liability for that year is now closed by the statute of limitations.

ARGUMENT

I

THE INTERESTS GIVEN TO THE MINOR BENEFICIARIES WERE FUTURE INTERESTS

The opinion in *Fondren* v. *Commissioner*, decided on January 29, 1945, rejects as erroneous the process of reasoning by which the court below came to the conclusion that the gifts to the minors here were gifts of present interests. The court below found, contrary to the conclusion of the Tax Court, that the gifts to the minor children were "immediate, definite, absolute, and ir-

revocable. In no respect did they depend upon the happening of an uncertain future event either for the determination of the donees or the quantum of the gifts.". (R. 49.) In referring to the gifts as "immediate" the court evidently meant that the beneficiaries' interests were presently vested, for it held that despite the provision for accumulation of income, "The gifts were the property of the minor donees none the less; and so was the income which recurrently accrued thereon even though it was to be accumulated during the donees' minority." (R. 50.) It stated that "The surrender of ownership by the donor of the subject matter of the gifts and the investiture of the donees therewith was just as certain and definite in the case of the minors as it was in the case of the adults." (R. 51.) The court's overruling of *Commissioner* v. *Taylor,* 122 F. 2d 714 (C. C. A. 3d), certiorari denied, 314 U. S. 699 (R. 51), provides further proof that the decision below proceeds on a basis wholly inconsistent with the rationale of the *Fondren* decision, for in the *Taylor* case, as in *Fondren,* two barriers stood between the time of the gift and its enjoyment—the "sole discretion" of the trustee and the need of the income for education and support.

Contrary to the premises from which the court below proceeded, the *Fondren* opinion establishes that the donor's surrender of ownership and the

investiture of the donees are irrelevant,[1] for as Mr. Justice Rutledge, speaking for the Court, stated:

> The question is of time, not when title vests, but when enjoyment begins.

And in so far as the opinion below relies upon the fact that here the donees were known and the quantum of the gifts was certain, its reliance is erroneous, for, as this Court held—

> the crucial thing is postponement of enjoyment, not the fact that the beneficiary is specified and in *esse* or that the amount of the gift is definite and certain.

The facts of this case do not differ in any material respect from those of the *Fondren* case. The cases are essentially alike, the differences being that here the period for accumulating income terminates when the beneficiaries reach 21 years of age instead of 25, 30, and 35, and the accumulated income is to be paid over at age 21, not simultaneously with the distribution of the corpus. (R. 19–20, 28–29.) Distribution of a part of the corpus is to occur when the beneficiary reaches

---

[1] In *Wisotzkey* v. *Commissioner*, 144 F. 2d 632, decided after the instant case, the court below likewise regarded these factors as irrelevant. There under the Group III trusts the accumulation of income was mandatory until the beneficiaries became 21 years of age, and the income accumulated in that time became part of the corpus, to be distributed at a future date. In holding that the gift of the income was a future interest, the court said that the controlling interest is not that which he donor parted with, but that which the donee receives.

45 years of age; the other part will never be distributed to him but will pass to his descendants, either such descendants as he may appoint by will or his descendants generally, after his death, as will the entire corpus if he dies before reaching 45. (R. 19–20, 28–29.) The trustees here are authorized to expend out of principal such sums as they may consider to be for the best interests of the beneficiary, minor or otherwise, during illness or emergency, in no case to exceed 10% of the particular beneficiary's share of the principal. (R. 23, 32.) The trusts require the trustees to accumulate the income until each of the beneficiaries becomes 21, but also provide that the trustees during such time (R. 21, 29–30)—

> shall apply such income therefrom as may be necessary for the education, comfort and support of the respective minors, and shall accumulate for each minor until he or she reaches the age of twenty-one years, all income not so needed.

There is no recital here, as there was in the *Fondren* trusts, that the beneficiaries are expected to have other and adequate means of support. Some of the trust income here was paid over for the minor beneficiaries in 1936 and 1937 (R. 36–38); in 1937 the mother of the beneficiary returned some of the checks issued to her for income payments by the corporate trustee (R. 37–38). After 1937 the income for the beneficiaries who continued to be minors was accumulated during their

minority. (R. 38.) One of the two trusts produced no net income. (R. 38.)

We submit that the differences of fact between this case and the *Fondren* case are without significance, and do not call for a difference in result.

Disregarding for the moment the power of the trustees to pay income over for education, comfort and support, we think it immaterial that the period of accumulation of income here was to terminate at age 21 instead of age 25 and later, as in the *Fondren* case. If all of the income were to be accumulated until the beneficiaries reach 21, the income estate would unquestionably be a future interest even though the accumulations would be concurrent with the minorities of the beneficiaries. With this conclusion the court below agrees. *Wisotzkey* v. *Commissioner,* 144 F. 2d 632. By the same token the beneficiaries' interests in the trust principal are future interests, even as to the 10% of the principal which might be paid over during illness or to meet an emergency, for these are contingencies of need in the future and fall squarely within the *Fondren* opinion. The trustees are required to continue to hold half of the principal until the beneficaries reach age 45, and the other half until after their death, except upon the earlier occurrence of illness or emergency—needs not existing at the time the gift took effect but which might arise later through anticipated but unexpected conditions. Thus, even if

the gift of the income were held to be a gift of a present interest, the gift of the corpus is one *in futuro*. *Fisher* v. *Commissioner*, 132 F. 2d 383 (C. C. A. 9th); *Sensenbrenner* v. *Commissioner*, 134 F. 2d 833 (C. C. A. 7th).

It is equally clear, we think, that the gift of income to each of the minor beneficiaries is a gift of a future interest. Each trust provides for accumulation of the net income and directs the trustees during the accumulation period to "apply such income therefrom as may be necessary for the education, comfort and support" of the minor children, and to accumulate the balance. The gift of income is unquestionably indefinite as to amount and time of enjoyment. This factor alone would be sufficient to establish the future character of the gift. Beyond that, however, we submit that the trust instruments themselves show that they were intended to be merely reserves available in case of necessity. They contain no positive direction to the trustees to pay over the income for the benefit of the minors, either periodically or currently. The trust instruments contain, we believe, an implicit recognition that other funds might be primarily available for the education and support of the minor children. It is not fortuitous, of course, whether the children will be supported and educated out of some funds, but it is fortuitous, so far as the trust instruments are concerned, whether the income from these trusts will be used for such purpose. The vesting in the

trustees of the power to pay over or accumulate the income shows that the grantor himself could not predict what the need would be; he left that for the trustees to determine from time to time according to future circumstances. The power given to the trustees assumes also that the trustees shall make the initial judgment, both as to the need of the beneficiaries and the amount of trust income required to satisfy that need. In the exercise of that judgment the trustees are required only to act reasonably, and if they should reasonably determine that none of the income or only a part of it was needed, they could not be compelled to make distribution. The enjoyment of the gift by the beneficiaries is thus dependent, under any trust like the present one, upon the need of the beneficiaries for the income for their education, comfort and support; upon the continuance of that need throughout the period when the income is directed to be accumulated, upon the availability of other funds; and, to a substantial degree and as to all these matters, upon the trustees' exercise of judgment. These conditions upon which the enjoyment of the gift is dependent are to occur in the future; if not, the deed would contain no provision for accumulating the income.

An interest whose enjoyment is dependent upon such future contingencies is, we believe, a future interest. It is not an interest "limited to commence" in enjoyment at the time the gift is made.

Cf. Treasury Regulations 79, Article 11, *supra*, pp. 3–4. So far as the beneficiary receives present enjoyment of any part of the income, he does not do so because the enjoyment is "limited to commence" at present, but because of circumstances *dehors* the limitations in the trust instruments, which show a need so compelling as to require distribution of the trust income by the trustee.

Moreover, we do not think it can be said that the need here was presently existing when the gift was made, and therefore that the gift of income was a present gift. Presently existing need cannot be presumed in the face of the grantor's direction to accumulate the income. If there was such a need, that fact must be proved by extrinsic evidence showing, *inter alia*, the beneficiaries' station in life and how much they require for their "comfort", what likelihood there is that the parents will continue to support the beneficiaries from resources outside the gift, what other property the beneficiaries may have available either by reason of other gifts or bequests or other donations to the same trust in earlier years, whether the trustees are likely to be liberal or stringent in their application of the trust income, and what likelihood there is that the need existing when the trust is created will continue throughout the accumulation period. Even when such a showing is made, unless it is proved that all of the income will in reasonable certainty be paid

over as it accrues, it still is necessary to value the present interest of the donee. Some part of his interest, at least, is limited to commence in enjoyment in the future, and before the exclusion may be allowed with respect to any portion of the gift the present interest must be evaluated. See the opinion of Judge Biggs dissenting below. (R. 52–53.) The exclusions here involved are no different from any other exemptions in the requirement that the taxpayer must prove the facts entitling him to the exemption which he claims. Cf. *New Colonial Co.* v. *Helvering*, 292 U. S. 435. The interests here do not become present interests simply because the income might all be paid over to the beneficiaries currently and the accumulated income might, if necessary, be entirely exhausted. See *Wisotzkey* v. *Commissioner*, 144 F. 2d 632, 637. Such reasoning ignores the fact that some part of the gift is limited to commence in possession or enjoyment in the future. It ignores also the burden incumbent upon the taxpayer to prove that the interest in question is an interest with respect to which the exclusion is allowable.

In considering whether such an inquiry into circumstances *dehors* the trust may be availed of to show that the donee's interest is not a future interest, it must be emphasized that Congress was in search of a workable rule. The use of the term "future interests" was adopted as a means of eliminating problems of determining the eventual tak-

ers of the gift and the value of their interests. See *United States* v. *Pelzer*, 312 U. S. 399, 403; H. Rep. No. 708, 72d Cong., 1st Sess., p. 29 (1939–1 Cum. Bull. (Part 2) 457). It was not the Congressional intent, in making use of that term, to subject to litigation every gift made to a trust like the one here involved.[2] We believe that interests which might be enjoyed only in the future, from all that appears on the face of the trust instrument, are future interests within the meaning of the statute.[3] Such a decision would be desirable

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[2] The question could never be finally determined with respect to any trust of the present kind. The income from the original gift in trust might be found to be no more than sufficient to meet the beneficiary's need. But with each subsequent gift augmenting the trust estate, the question arises again. The present case, like the *Fondren* case, illustrates the tendency of donors to make gifts of less than $5,000 from year to year to the same trusts and the same donees to derive the full advantage of the annual exclusion.

We know of no Congressional policy requiring broad application of the exclusion; it is retained in the statute only because administrative difficulties prohibit its abolition. See H. Rep. No. 2333, 77th Cong., 2d Sess., p. 37 (1942–2 Cum. Bull. 372), relating to the Revenue Act of 1942 in which the exclusion was reduced to $3,000:

"Since this is an annual exclusion (not exhaustible as is the specific exemption) and is not limited to any number of donees, it is possible to distribute property of large aggregate value over a period of years, free not only of gift tax but of estate tax as well. While administrative difficulties prevent the abolition of the exclusion, your committee recommend that it be reduced to $3,000."

[3] Circuit Court of Appeals decisions appear to be in conflict on the question whether circumstances surrounding the creation of the trust may be considered. Thus *Smith* v. *Commis-*

for the avoidance of litigation. However, if the question is to be determined from the circumstances surrounding each particular gift, we submit that the circumstances here do not show the gifts at bar to be gifts of present interests, and that no exclusions are allowable.

We think that no particular significance is to be attached to the fact that the trust instruments here do not recite, as they did in the *Fondren* case, that the beneficiaries will have other and adequate means of support, or that the trustees under the 1936 trust paid over some of the income to the mother of the minor beneficiaries in 1936 and part of 1937. The absence of the recital merely leaves the record lacking in proof as to the beneficiaries' need for the income. The payments which were made under the 1936 trust hardly establish that there was a need so great as to compel distribution. The payments at best are equivocal evidence of need, since some of the checks given by the corporate trustee in 1937 were returned by the beneficiaries' mother, presumably because they were not needed. Certainly, so far as the beneficiaries did enjoy part of the income estate, they did so not because that estate as limited was a present one, but because of the circumstance that the trustees exercised their judgment in the beneficiaries' favor

sioner, 131 F. 2d 254 (C. C. A. 8th), which turned upon such an inquiry has been said to rest upon "an unsecure foundation." *Fisher* v. *Commissioner*, 132 F. 2d 383, 386 (C. C. A. 9th).

even though they were not compelled to do so. But the nature of the interest of the beneficiaries is determined as of the date of the gift, not by what the trustee may subsequently choose to do in the exercise of the powers given to him. *Commissioner* v. *Gardner*, 127 F. 2d 929, 931 (C. C. A. 7th); *Commissioner* v. *Brandegee*, 123 F. 2d 58, 61 (C. C. A. 1st). Throughout the remainder of the beneficiaries' minorities until the time of trial the income was accumulated, thus demonstrating that the right to enjoy so much of the income, at least, was dependent upon a contingency of need in the future, and was not a present interest. The present record does not show that any of the income of the 1936 trust was a present interest.

Moreover, with respect to the 1936 trust, gifts were made in different years; first, when the trust was created in 1936, and, second, in March of 1937 when further securities were transferred in a value of $5,000 for each beneficiary. (R. 16–17.) Both donations are involved here, the first in determining the amount of the taxpayer's net gifts for years prior to the tax year (see point II, *infra*, pp. 23–25), and the second in determining the net gift made in the tax year. Even if it were to be held, contrary to our contention, that the first donation was made in such circumstances of need that the interests were present, nevertheless the second donation clearly was not made under such

circumstances. The record shows that no income was needed by the beneficiaries after the early part of 1937. (R. 37–38.)

Under the 1938 trust no income had been produced prior to the hearing below, nor did the grantor expect that any income would be produced, the corpus consisting wholly of entirely unimproved real estate. (R. 38.) We submit that the beneficiaries took no present interest in the nonexistent income from that gift. Certainly any present interest which they may have taken in the income estate had no value. And their interests in the corpus were clearly future interests. The corpus was to be held by the trustees until the beneficiaries reached 45; then only part of it would be paid over. (R. 18–21, 27–29.) The corpus could be invaded to a limited extent only, and only during illness or emergency.

We submit, therefore that no exclusion is allowable with respect to either trust.

II

THE STATUTE OF LIMITATIONS DOES NOT PRECLUDE THE CORRECT DETERMINATION OF THE AMOUNT OF NET GIFTS MADE BY THE TAXPAYER IN PRIOR YEARS, FOR THE PURPOSE OF DETERMINING THE CORRECT TAX LIABILITY FOR THE CURRENT YEARS

The gift tax for each calendar year is the excess of a tax, properly computed, on the aggregate of net gifts made in the tax year and in each preced-

ing calendar year over a tax, properly computed, on the aggregate of net gifts made in preceding calendar years. Revenue Act of 1932, Section 502, *supra*, p. 2. The taxpayer maintained in the Tax Court that since the statute of limitations had run against the year 1936, the Commissioner could not make a new, correct determination of the net gifts made in 1936 for the purpose of computing the tax for 1937 and 1938. The Tax Court rejected the contention (R. 41) and the Circuit Court of Appeals did not reach the question, although Judge Biggs in his dissenting opinion stated that the Tax Court's ruling on this point was correct (R. 24).

The statute[4] precludes assessment or a proceeding in court without assessment for the collection of taxes after three years after the return was filed. Hence the tax liability for 1936 is closed. But the statute does not purport to preclude an examination into events of prior years for the purpose of correctly determining the gift tax liability for years which are still open.

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[4] Revenue Act of 1932:

SEC. 517. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

(a) *General Rule.*—Except as provided in subsection (b), the amount of taxes imposed by this title shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of three years after the return was filed.

* * * * *

This view is supported by the pertinent Treasury Regulations[5] and has been uniformly applied by the Tax Court. *Winterbotham* v. *Commissioner*, 46 B. T. A. 972; *Roberts* v. *Commissioner*, 2 T. C. 679, affirmed on another issue, 143 F. 2d 657 (C. C. A. 5th), certiorari denied, February 5, 1945; *Wallerstein* v. *Commissioner*, 2 T. C. 542. The situation is analogous to that involved in *Commissioner* v. *Gooch Co.*, 320 U. S. 418, where an audit made in 1938 of the taxpayer's books disclosed an erroneous valuation of its inventory of June 30, 1935. Because of this error the taxpayer had overpaid its income taxes for 1935, and the excess payment was not subject to refund because barred by the statute of limitations. On the basis of the adjusted inventory, however, the Commissioner determined that there was a tax deficiency for 1936. This Court confirmed the action of the Board of Tax Appeals in sustaining the Commissioner's determination, holding that the Board had power to redetermine the 1936 deficiency distinct from any overpayment or underpayment in any prior or subsequent year.

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[5] Treasury Regulations 79, Article 5:

* * * By the words "aggregate sum of the net gifts for each of the preceding calendar years" (aside from the amount of the specific exemption deductible) is meant the true and correct aggregate of such net gifts, not necessarily that returned for such years and in respect to which tax was paid. * * *

CONCLUSION

We submit that the decision of the Tax Court was correct, and that the decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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MARCH 1945.

U. S. GOVERNMENT PRINTING OFFICE 1945

IN THE

Supreme Court of the United States

October Term, 1944.

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COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

WILLIAM D. DISSTON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States.

No. 589. October Term, 1944.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

WILLIAM D. DISSTON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The memorandum opinion of the Tax Court (R. 60-63) has not been reported. The opinion of the Circuit Court of Appeals (R. 72-79) is reported in 144 F. (2d) 115 (C. C. A. 3d, 1944).

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on July 12, 1944 (R. 79). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTION PRESENTED.

Whether gifts in trust for minors can be gifts of present interests, the first $5,000 of which are excluded for gift tax purposes under Section 504 (b) of the Revenue Act of 1932.

ARGUMENT.

There are no special or important reasons for granting the certiorari. The amounts involved are small (totalling less than $2,100 of taxes). There is actually no such conflict among the Circuits as petitioner suggests, because in the last analysis each decision depends on the exact terms of a deed of trust which is unlike that in every other decision. The apparent conflict in language in some of the decisions must be limited by what was in fact decided in each case. The trust in this case is not a trust to accumulate the income as petitioner asserts. Nor will the decision in this case in any way interfere with the administration of the tax laws.

1. An examination of the Disston deeds of trust establishes that the trustees were legally obligated to support, maintain and educate the minor beneficiaries. The direction to accumulate any income not needed for support, maintenance and education is without significance, because it merely incorporates into the deed of trust the duty imposed by law upon *all* who are entrusted with property belonging to a minor:

> "The provision for the accumulation of income affected neither the identity of the minor donees nor the value of the gifts. At most, the provision was but compliant recognition by the donor of what the law, out of its solicitude for the safeguarding of a minor's property, would have interposed in the absence of the donor's express direction in such regard." (Instant case at R. 76.)

The distinction between the instant case and the decisions cited by petitioner as in conflict with the instant case is the distinction between (1) an absolute duty to support, educate and maintain the minor beneficiary, and (2) a duty to support, educate and maintain *only if* the trustee in his uncontrolled discretion wants to support, educate and maintain the minor beneficiary.

In *Welch et al. v. Paine*, 120 F. (2d) 141 (C. C. A. 1st, 1941), the income of the trust for minors was to be accu-

mulated but the trustee was *empowered*, not directed, to advance to the beneficiaries or for their benefits such sums out of their respective shares as he might *in his absolute discretion* deem necessary, or advisable for their support, education and maintenance.

In each trust instrument considered in *Welch v. Paine*, 130 F. (2d) 990 (C. C. A. 1st, 1942), it was provided that the trustee "*in his discretion* . . . may accumulate or withhold and make payments or distributions of shares and income to or for the education or support of any of your children as the trustees may deem best . . ." (p. 990, italics added).

The duty imposed on the trustee with respect to the shares of minor beneficiaries in the case of *Fondren v. Commissioner*, 141 F. (2d) 419 (C. C. A. 5th, 1944), is also a discretionary duty. This is so even though one or two directions if read independently of the balance of the deed of trust would create an absolute duty.

Each of the deeds of trust involved in *French v. Commissioner*, 138 F. (2d) 254 (C. C. A. 8th, 1943), provided in substance that ". . . so long as a child of mine, who is under legal disability, is an income beneficiary hereunder, the trustee may *in its discretion* disburse or accumulate all or any part of the net income . . ." (italics added).

In *Commissioner v. Gardner*, 127 F. (2d) 929 (C. C. A. 7th, 1942), the trust indenture provided in part that ". . . the trustee shall use and apply such portions of the net income of the respective shares of the grantor's said grandchildren in and to the trust estate *as the trustee may deem necessary and proper* for their education, maintenance and support . . ." (pp. 929-930, italics added).

Each of the cases cited by Commissioner was very close, and in each the gift was held to be a gift of a future interest. Whether the accumulation of income during minority coupled with discretion in the trustee to spend the same for the support, maintenance and education of the minor should change a gift which in all other respects is a gift

of a present interest is open to serious question. However, when the gift is as complete a gift of a present interest as can be made to a minor, *by any means whatsoever*, there should be no doubt. Each of the gifts by respondent in the instant case is in all respects as complete a gift of a present interest as a minor is legally capable of receiving.

In *Wisotzkey v. Commissioner*, not officially reported but found in Volume 4 of Prentice-Hall Federal Tax Service, page 63120, the Circuit Court of Appeals for the Third Circuit said (page 63124):

> ". . . There is an important factual difference between the Disston case and the instant case.
>
> "By the terms of the trust indenture in the Disston case, authority was vested in the trustees to appropriate to the benefit of minor donees, from the accumulated income, amounts necessary to defray expenses for the education, comfort and support of the donees . . . The accumulated income might be, if necessary, entirely exhausted."

2. The second reason advanced by the petitioner assumes that the trust in the instant case is a trust to accumulate income. This assumption is contrary to the actual facts.

3. Petitioner has failed to indicate how the decision below may give rise to serious problems in evaluating the interest of a beneficiary. Respondent believes that the recognition of the fact that the gifts to the minors in the instant case were gifts of present interests would eliminate altogether any question of evaluation of interest.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DAVID A. KERR,
HAROLD EVANS,
Counsel for Respondent.

IN THE

Supreme Court of the United States

No. 589. **October Term, 1944.**

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

WILLIAM D. DISSTON.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

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IN THE

Supreme Court of the United States.

No. 589. October Term, 1944.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

WILLIAM D. DISSTON,
Respondent.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The memorandum opinion of the Tax Court (R. 39-41) has not been reported. The opinion of the Circuit Court of Appeals (R. 46-53) is reported in 144 F. (2d) 115 (C. C. A. 3d, 1944).

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on July 12, 1944 (R. 79). The petition for a writ of certiorari was filed on October 12, 1944, and was granted on February 5, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTIONS PRESENTED.

(1) Whether gifts in trust for minors are gifts of present interests, the first $5,000 of which are excluded for gift tax purposes under Section 504 (b) of the Revenue Act of 1932.

(2) Whether the Commissioner in computing the 1937 and 1938 gift taxes may make adjustments in the computation of net gifts in the year 1936 after the statute of limitations has barred any redetermination or adjustment of the 1936 gift taxes.

SUMMARY OF ARGUMENT.

I.

The ruling of the court below that the gifts here involved are gifts of present interests and that the settlor is entitled to the specific exclusion rests upon the ground that the gifts of the minor beneficiaries vested immediately in enjoyment and were irrevocable, definite and not uncertain either as to the identity of the donees or the amount of the gifts. An examination of the Disston deeds of trust establishes that the trustees were legally obligated to immediately apply the income of the trusts for the support, maintenance and education of the minor beneficiaries. The direction to accumulate any income not so needed is without significance because it merely incorporates into the deed of trust the duty imposed by law upon *all* who are entrusted with property belonging to a minor.

The petitioner assumes that the trust in the instant case is a trust to accumulate income. This assumption is contrary to the actual facts. The distinction between the instant case and the decisions cited by petitioner is the distinction between (1) an absolute direction to support and educate the minor beneficiaries, and (2) a direction to support and educate *only if* the trustee in his uncontrolled discretion wants to support and educate the minor beneficiaries. In the instant situation the trustees are obligated to use the income for the support and education of the beneficiaries even though there may be other funds available for such purposes.

The deed of trust provides for the immediate application of the income for the minor's comfort, support and education and the corpus of the trust is not more than is reasonably sufficient to produce the income required and to insure its continued payment for these purposes. For this reason the entire gift is a gift of a present interest.

II.

Petitioner, having determined that the gifts for the minor children in 1936 were gifts of present interests, should not be permitted, after the Statute of Limitations has run, to reverse this determination so as to increase the gift taxes for subsequent years. Petitioner's interpretation would make it impossible for a donor or the government to determine the donor's aggregate gift tax liability until after the death of the donor. It would result in confusion and uncertainty and defeat the purpose of the Statute of Limitations enacted by Congress.

Argument.

I.

THE GIFTS WERE GIFTS OF PRESENT INTERESTS.

Under the facts in this case the gifts made by respondent in trust for his minor children vested immediately in enjoyment to the fullest extent possible and were, therefore, gifts of present interests.

A. Gifts Under Deed of Trust Dated December 17, 1936.

On December 17, 1936, respondent created a deed of trust for the benefit of his five children, three of whom were minors. The initial gift to the trustees was $64,975.83. In 1937 respondent added $25,000 to this trust. The Commissioner has never questioned the present nature of the gifts with respect to adult beneficiaries.

The treatment of adult and minor beneficiaries is identical except with regard to the direction to accumulate the income of shares of minors in Paragraph 3 and the mandate in Paragraph 6 (a later expression of the settlor's intent) to apply the income of minors' shares for education, comfort and support of the respective minors.

Section Second, Paragraph 6 provides:

> "6. *Trustees shall hold the shares of minors* in whom the principal shall have vested during their respective minorities, and during such time *shall apply such income therefrom as may be necessary for the education, comfort and support of the respective minors,* and shall accumulate for each minor until he or she reaches the age of twenty-one years, all income not so needed. *The foregoing clause shall apply to minor children of the Settlor irrespective of the direction heretofore set forth to accumulate all income for such minors. . . .*" (Italics added.)

In this section the respondent has in the clearest possible language directed the trustees to use the income for

the education, comfort and support of the minor beneficiaries. The direction to accumulate any income not needed for support, maintenance and education was not intended to lessen the gift to the minor beneficiaries or place adult beneficiaries in a superior position. Actually it is without significance because it merely incorporates into the deed of trust the duty imposed by law upon all who are entrusted with property belonging to a minor.

Under the terms of the trust the obligation of the trustees was to immediately apply the income of the trust to the extent available for the support and education of the minor beneficiaries in a manner becoming their station in life.

The petitioner takes the position that there is no distinction between (1) a positive direction to support and educate and (2) uncontrolled discretion in the trustee as to whether the income shall be applied for support and education. In this we believe the petitioner is in error.

The distinction with respect to instructions by the settlor to the trustee is stated by the American Law Institute Restatement of Trusts, Section 187, as follows:

> "If the trustee is empowered to apply so much of the trust property as he may deem necessary for the support of the beneficiary and the trustee does not apply at least the minimum amount which could reasonably be considered necessary for the beneficiary's support, *the court will compel the trustee to pay the beneficiary at least that minimum amount.*" (p. 487; italics added.)

> "The settlor may, however, manifest an intention that the trustee's judgment need not be exercised reasonably, even where there is a standard by which the reasonableness of the trustee's conduct can be judged. This may be indicated by a provision in the trust instrument that the trustee shall have 'absolute' or 'unlimited' or 'uncontrolled' discretion. These words are

> not interpreted literally but are ordinarily construed as merely dispensing with the standard of reasonableness. In such a case the mere fact that the trustee has acted beyond the bounds of a reasonable judgment is not a sufficient ground for interposition by the court, so long as the trustee acts in a state of mind in which it was contemplated by the settlor that he would act." (pp. 488-489)

To the same effect, see also Scott on Trusts, Section 187.

A fortiori, the court will compel distribution where, as here, there is no discretion and the trustee is under an absolute duty to distribute the income for the support and education of the minors.

The petitioner further assumes that the trustees in this case were under no duty to apply the income "for the education, comfort and support" of the minors unless the minors were not supported from other sources. Thus on page 16 of petitioner's brief it is stated that "it is fortuitous, so far as the trust instruments are concerned, whether the income from the trusts will be used for such purpose." This assumption we also believe is erroneous. As stated in the American Law Institute Restatement of Trusts, Section 128, Comment "e":

> "It is a question of interpretation whether the beneficiary is entitled to support out of the trust fund even though he has other resources. *The inference is that he is so entitled.*" (p. 327; italics added.)

Scott on Trusts, Section 128.4, contains the following statement:

> "Where the trustee is *directed* to pay to the beneficiary or to apply for him so much as is necessary for his maintenance or support, *the inference is that the settlor intended that he should receive his support from*

the trust estate, even though he might have other resources."

See also: *Walter's Case*, 278 Pa. 421, 123 Atl. 408 (1924);
Hill v. Clark, 74 Pa. Super. 181 (1920);
Grady's Estate, 34 Pa. D. & C. 143, 146 (1938).

In the present case it was the trustees' duty to apply the entire net income of each minor's trust for his or her support regardless of the other resources of the minor, and this duty would continue until the income of a minor's trust became greater than the minimum amount which could reasonably be considered necessary for such support and education in the manner becoming his position in life. Obviously, the income of the trusts for each of the minors was below the minimum amount needed for a minor's support, averaging as each trust did less than $400 a year during the years 1936, 1937 and 1938 (R. 36).

The trustees complied with their duty and paid out the income for the support of the minors until the middle of 1937, when distribution checks sent to the minors' mother were returned by her. The fact that the minors' mother thus apparently indicated her desire not to receive payments for the minors' support can in no way affect the duty of the trustees or the character of the gifts. It is also submitted that an actual breach of duty by the trustees could not change the original character of the gift.

The petitioner argues that the gift was not a gift of a present interest because the settlor could not predict what the need would be. No one can accurately predict what it will cost to support and educate a minor. It is self-evident, however, that the settlor knew the cost would exceed the income from the trusts created. Owing to the fact that the settlor contemplated adding to the trust, it was proper for him to provide for the *possibility* that at some time in the future the income might be more than was necessary for the support of the minors. No one, however, could

possibly contend that the income of the trusts as they existed in 1937 and 1938 was more than the minimum required for the reasonable education and support of the minors.

The present situation is closely analogous to one where outright gifts are made to minors. In such event, owing to the disability of the minors, guardians would be appointed for them and the income would be expended for their benefit insofar as necessary for their education and support and the balance accumulated and paid to them upon reaching twenty-one years of age. It is submitted that the interests of the minors in this case are even more clearly a present interest than they would be if the gifts had been made direct to the minors because here the minors immediately possess the fullest enjoyment of the gifts. The reason for this is that in the instant situation the trustees are under a positive direction of the settlor to use income for the minors' support and there is no barrier to the minors' enjoyment, whereas a guardian should first obtain court approval for such action. Under Pennsylvania law when a guardian is going to spend money for the support and maintenance of his ward, the proper procedure is to obtain a court order directing the expenditures: Act of June 7, 1917, P. L. 447, § 59 (i), 20 P. S. 1042. Failure of the guardian to obtain such a court order shifts the burden of justifying the necessity as well as the reasonableness of the expenditures: In re *Henry's Estate,* 341 Pa. 439, 19 A. (2d) 66 (1941). A trustee acting under a positive direction *must* act without prior court approval and the burden is upon any exceptant to prove that there was no necessity and that the expenditures were unreasonable. A guardian who has obtained court approval and a trustee, where the trust contains such a positive direction as here, are both under a duty to make payments for the necessary support, maintenance and education of the minor. Discretion must be exercised in some manner when any payment is made for the benefit of a minor. The decisive factor is the ex-

istence of the duty to make the payments; it is irrelevant that the payments are to be made in one situation by a guardian and in another by a trustee.

Had the respondent made such outright gifts to his minor children, no one would seriously contend that they were not gifts of present interests, though in that case, as in this, only so much of the income would have been used for their benefit as was necessary and the balance would have been accumulated for them until they became of age. Exactly the same principle should apply to the present case. It is immaterial that the result was achieved through the medium of a trust instead of by outright gifts to the minors. So, also, the same result would have been reached had the deed of trust made exactly the same provision for the minors as it did for the beneficiaries who were of age, i. e., without any reference to accumulating the income. In such case the trustees being directed to distribute the income quarterly to the minors would have been required, because of their disability, to use so much as might be necessary for their support and to accumulate the balance. In such case petitioner would have been forced to admit that the gifts were of present interests, unless he is prepared to go to the extreme of asserting that no gifts of present interests can be made to minors. Such a contention obviously could not be sustained.

The case of *Fondren v. Commissioner*, U. S. , 65 S. Ct. (Adv.) 499, decided by this Court on January 29, 1945, presents a factual situation where the settlor directed that the income be accumulated for the minors, but gave the trustee power in his sole discretion to use it for the minor's education and support. In that case the intent of the settlor, that the income be accumulated unless no other funds were available for the support and education of the minors, was explicitly stated in the deed of trust. In the instant situation there is nothing, *implicit or otherwise*, to indicate such an intent on the part of the settlor. On the contrary the clearly expressed intent of the settlor

is that the income be used immediately for the support and maintenance of the minors.

At page 22 of his brief the petitioner recognizes that "the nature of the interest of the beneficiaries is determined as of the date of the gift, not by what the trustee may subsequently choose to do in the exercise of the powers given to him. *Commissioner v. Gardner*, 127 F. 2d 929, 931 (C. C. A. 7th); *Commissioner v. Brandegee*, 123 F. 2d 58, 61 (C. C. A. 1st)." However, the petitioner in an effort to put the instant situation on all fours with the *Fondren Case* emphasizes the circumstances *dehors* the trust and minimizes the language and expressions of the intention of the settlor in the trust.

It is submitted that the differences of fact between this case and the *Fondren Case* are significant and call for a difference in result. The *Fondren* trusts call for accumulation and provide for distribution only if absolutely necessary. In contrast to this the present trust compels the immediate distribution of the income for support and maintenance of the minors and provides for the possibility of accumulation. In the *Fondren Case* the period of accumulation extended beyond minority whereas in the instant situation the possibility of accumulation ends with the end of the period of legal disability. There is nothing in the present case to indicate a principal concern for a period of adult life. No contingency stands in the way of the minors receiving the income from the trusts.

The situation here presented is precisely the situation referred to by this Court in the *Fondren* decision:

> "Whenever provision is made for immediate application of the fund for such a purpose (minor's benefit), whether of income or of corpus, the exemption applies." (p. 505; parenthesis added.)

While the decision of the court below went farther than the present deed of trust requires, nevertheless the court correctly interpreted the language of the present deed:

"The provision for the accumulation of income affected neither the identity of the minor donees nor the value of the gifts. At most, the provision was but compliant recognition by the donor of what the law, out of its solicitude for the safeguarding of a minor's property, would have interposed in the absence of the donor's express direction in such regard . . . *The use and enjoyment of the gifts were the minor's from the day the gifts were made.*" (R. 50; italics added.)

Petitioner implies that the court below in the case of *Wisotzkey v. Commissioner*; 144 F. (2d) 632 (C. C. A. 3rd, 1945), changed its position with respect to the nature of the gift in the instant situation. Again we believe this is an error. The court below distinguished the instant factual situation. Footnote 1 on page 13 of petitioner's brief likewise distinguishes the *Wisotzkey Case* from the present case.

In the *Wisotzkey Case* accumulation was mandatory and income so accumulated became corpus. In the present case distribution for the support and education of the minors is mandatory. Unless the corpus is hereafter increased there is no possibility of accumulation under the terms of the trust.

In an attempt to strengthen his position, petitioner in his brief (p. 19) emphasizes that Congress was in search of a workable rule and, in addition, cites discussion from the Congressional Record (p. 20). It is quite clear that Congress retained the annual exclusion to avoid administrative difficulties. The petitioner, however, now seeks to press the legislation beyond the point which Congress in the exercise of its judgment believed to be feasible. Petitioner quite obviously feels that the annual exclusion should be abolished and is attempting to do so in the instant situation because property of minors requires slightly different treatment. It is this desire on the part of petitioner to narrow the annual exclusion to the point of elimination, if

possible, which is responsible for subjecting "to litigation every gift made to a trust like the one here involved." (Petitioner's brief, p. 20.)

Under the law it is perfectly proper for a donor to make annual outright gifts to the same donees to take full advantage of the annual exclusion. It is no less proper for donors "to make gifts of less than $5,000 from year to year to the same trusts and the same donees to derive the full advantage of the annual exclusion." (Petitioner's brief, p. 20.) The only requirement is that the beneficiaries be able to immediately enjoy the gift. The present deed fulfills this requirement. Mr. Justice Holmes made the following pertinent observation:

> "The fact that it (the taxpayer) desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it." Superior Oil Co. v. Mississippi ex rel. Knox, 280 U. S. 390 at 395, 396 (1930).

The petitioner raises the question of the gift of the principal for the first time in his brief filed with this Court. It seems clear to us that the entire interest in the gift belonged to the minor beneficiaries. No third party had any interest in or to the gift. The entire income and enjoyment of the gift vested immediately in the minor beneficiaries and will remain there until the principal is distributed. At age 45 the beneficiaries will receive one-half of the principal. They have a power of appointment with respect to the remaining half. It is only by means of the donees that anyone could obtain any interest whatsoever in the gift. The trust provides for the distribution of the entire accumulation, if any, as a part of the minors' estates in the event of the death of one of the donees during minority. We submit that the gift of the principal is also a gift of a present interest. The same conclusion is reached if we consider the accepted definitions of present interests. The

American Law Institute's Restatement of Property, Section 153, Paragraph 3 provides:

"(3) A present interest is an interest in land or in a thing other than land, which includes

(a) either a right to the immediate beneficial enjoyment of the affected thing;

(b) or, if the affected thing is the subject matter of a trust,

(i) either the right to the immediate beneficial enjoyment of the proceeds of the trust;

(ii) or the right of the trustee forthwith to have the control and management of the affected thing pursuant to the provisions of the trust."

The gifts to the minors did not in this respect differ in any way from the gifts to the adult children in which case the Commissioner has conceded the settlor to be entitled to the specific exclusions.

The attempt on the part of the petitioner to have the principal of the trust declared a gift of a future interest even though the beneficiary is entitled to the immediate use and enjoyment of the entire income and the principal is no more than necessary to insure continued payment of the necessary funds, and even though the settlor has parted completely with his entire interest in the property, is merely another attempt of the petitioner to whittle away the exclusion granted by Congress. Such a policy can lead to nothing but administrative difficulties. It is submitted that Congress did not intend that such a procedure be followed with respect to gifts in trust.

We submit that the gift vested immediately in enjoyment in the minor beneficiaries to the fullest extent and that for this reason it is a gift of a present interest.

B. Gifts Under Deed of Trust Dated December 9, 1938.

The terms of the deed of trust of December 9, 1938, are substantially identical with those of the deed of December 17, 1936, so far as the interests given are concerned. As the corpus of the trust is real estate instead of securities, wide powers are given to the trustees to develop and improve the property (Section Fourth, Paragraph 2). The trustees are donor's three children then of age, the two minor children to become trustees as they come of age. (Section Seventh.)

The same considerations therefore apply to the gifts made in 1938 by this deed of trust as to those made in 1936 and 1937 under the 1936 deed.

II.

THE STATUTE OF LIMITATIONS.

Petitioner, having determined that the gifts for the minor children in 1936 were gifts of present interests, should not be permitted, after the Statute of Limitations has run, to reverse this determination so as to increase the gift taxes for subsequent years.

Even if the gifts were gifts of future interests petitioner should not be permitted, after the statutory period has run, to reverse his determination that they are gifts of present interests and thus increase the taxes for subsequent years.

It is admitted that the Statute of Limitations has run as to the calendar year 1936 and that petitioner is prohibited by law from assessing any tax with respect to that year at this time. Petitioner, however, in computing the deficiencies here in dispute, has reopened the respondent's 1936 return and redetermined the net gifts for that year with the result that respondent's gift taxes for the years 1937 and 1938 have been increased. By thus increasing respondent's taxes for 1937 and 1938 by adjusting transactions which occurred in 1936, petitioner has done indirectly

what he is forbidden by statute to do directly. If petitioner's interpretation is proper, it will be impossible for a donor or for the government to know until after the donor's death the amount of his aggregate gift tax liability. Under this interpretation, if respondent shall make a gift ten years from now, it will be possible for either respondent or petitioner to again reopen respondent's 1936 gift tax return and, for example, place a different value on the property which was given away in that year. This, of course, might benefit either respondent or petitioner, but such interpretation of the statute can result in nothing but confusion and uncertainty. Finality is the end which Congress sought to attain in providing Statutes of Limitations. The interpretation placed upon these provisions by petitioner nullifies the intent of Congress. The Tax Court decided this issue against respondent, following its previous decision in *Lillian Seeligson Winterbotham*, 46 B. T. A. 972. It is contended that this case should be overruled.

CONCLUSION.

For the foregoing reasons the decision of the court below to the effect that the gifts to the minors under both deeds of trust were gifts of present interests should be sustained.

Respectfully submitted,

DAVID A. KERR,
HAROLD EVANS,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 589.—October Term, 1944.

Commissioner of Internal Revenue, Petitioner, *vs.* William D. Disston.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[June 4, 1945.]

Mr. Justice Rutledge delivered the opinion of the Court.

This case, like *Fondren* v. *Commissioner*, 324 U. S. —, presents questions whether certain gifts to minors are gifts of "future interests in property," within the meaning of the Revenue Act of 1932, c. 209, 47 Stat. 169.

In 1936 the respondent, William D. Disston, created a trust for the benefit of each of his five children, three of whom were then minors. The total of his gifts that year was $71,952. The Commissioner allowed an exemption of $5000 on each gift for the children and on one to his wife. The taxpayer also was allowed the specific exemption of $40,000 provided by § 505 of the Revenue Act of 1932, as amended by § 301(b) of the Revenue Act of 1935. The net gifts for 1936 accordingly were computed to be $1952, upon which a tax was assessed and paid.

In 1937 the taxpayer added to the corpus of the trust securities valued at $25,000, of which $5000 was allocated to each child's interest, including the three who were still minors. In 1938 he created another trust for his five children, the corpus consisting of undeveloped land worth $38,581. Two of the children still were minors.

The two trusts were identical in all respects now material. The principal was divided into five equal shares, one for each child. The trusts were of the spendthrift variety. All shares of the corpus and income were to be free from "anticipation, assignment, pledge, or obligations of beneficiaries," as well as execution or attachment. The shares of the minors alone are now involved. Hence the nature of the trust as applicable to them only need be considered.

The taxpayer's son, William L. Disston, was nineteen in 1936 when the first trust was created. As to his share the trustees were directed, in the Second Article, "to accumulate the net income therefrom for the benefit of William L. Disston until he reaches the age of twenty-one years, at which time to pay over to him all accumulated income, and thereafter to pay over to him in not less than quarterly instalments the entire net income derived therefrom during his lifetime; provided, however, that upon his reaching the age of forty-five years one-half of the principal of his share shall be paid over to him free and discharged of all trusts; and upon further trust upon his death whether before or after reaching the age of forty-five years, to divide the principal of his share, or such portion thereof as is then held by the Trustees, among his then living descendants . . . in such amounts as he shall by will appoint, and in default of such appointment, to divide the same equally per stirpes," with provision for division among the taxpayer's other children and their descendants if no descendant of the beneficiary should then be living. The Article contains a proviso that if the taxpayer's son should die before reaching forty-five, the son may appoint to his spouse for a period no longer than her life not more than one-half of the income from his share of the corpus.

Identical provisions were made for the two minor daughters, except that they were to obtain only one-third of the corpus at age forty-five and could appoint to their spouses only one-third of the income.

A subsequent paragraph provided that the trustees should hold the minors' shares during their respective minorities, "and during such time shall apply such income therefrom as may be necessary for the education, comfort and support of the respective minors, and shall accumulate for each minor until he or she reaches the age of twenty-one years, all income not so needed. The foregoing clause shall apply to minor children of the Settlor irrespective of the direction heretofore set forth to accumulate all income for such minors."

In addition the Fourth Article, which defined the trustees' powers, authorized them "[t]o apply the income to which any beneficiary shall be entitled hereunder for the maintenance, education and support of such beneficiary should he or she by reason of age,

illness, or any other cause in the opinion of the Trustees be incapable of dispensing it. Payment by the Trustees to the parent of any minor . . . shall be sufficient acquittance and discharge to the Trustees for such payment or payments."

Finally, the trustees were authorized to invade the corpus in an emergency: "To expend out of the share of principal from which any beneficiary may be receiving income under this deed of trust such sums as Trustees may consider to be for the best interests of such beneficiaries during illness or emergency of any kind; provided, however, that in no case shall such expenditures of principal exceed in the aggregate ten percent (10%) of the value of such share of principal. . . ."

In operation the 1938 trust of unimproved realty had produced no net income to the time the case came before the Tax Court. Most of the 1936 income of the first trust, $288 for each minor, was paid to the mother of the beneficiaries. In 1937 partial payments of income, $94 per minor child, were made. The beneficiaries' mother returned other checks to the corporate trustee in 1937, and one of the individual trustees, an adult child of the taxpayer, directed the corporate trustee thereafter to accumulate the income of the minors. No further payments of income were made to any child prior to his becoming of age.

In determining the taxpayer's gift tax for 1937 the Commissioner disallowed three $5000 exclusions from the net gifts for that year on the ground that the gifts to the three minor children were gifts of future interests. For 1938 the Commissioner disallowed two $5000 exclusions on the ground that the gifts made that year to the two children who were still minors were gifts of future interests.

In computing the gift tax for 1937 and 1938 it was necessary for the Commissioner to compute the aggregate sum of the net gifts for the preceding years.[1] The Commissioner, in determining

[1] The formula results in a progressive rate of gift taxation, not limited to progression within the calendar year, but extending over the life of the donor. The computation formula is set forth in § 502 of the Revenue Act of 1932:

"The tax for each calendar year shall be an amount equal to the excess of—

"(1) a tax, computed in accordance with the Rate Schedule hereinafter set forth, on the aggregate sum of the net gifts for such calendar year and for each of the preceding calendar years, over

"(2) a tax, computed in accordance with the Rate Schedule, on the aggregate sum of the next gifts for each of the preceding calendar years."

the net gifts made for this purpose by the 1936 trust, adjusted the exclusions which he had allowed in 1936 to the extent of $5000 for each of the three minors The period of limitations for assessment and collection of 1936 gift taxes had run.[2]

The Tax Court upheld the Commissioner, but the Court of Appeals reversed, holding no future interests arose as a result of the gifts to the minors. Consequently it was unnecessary for the Court of Appeals to consider whether the statute of limitations barred readjustment of the net gift figure for 1936 or simply barred collection of any further gift taxes for that year.

The guiding principles were outlined recently in *Fondren* v. *Commissioner*, 324 U. S. —. Gifts of "future interests," within the meaning of § 504(b), to any person are not excluded from the computation of net gifts to the extent of the first $5000 in value, as are present interests. Treasury Regulation 79 (1936 ed.), Article 11, defines "future interests" as interests "limited to commence in use, possession, or enjoyment at some future date or time. . . ." The definition has been approved repeatedly. Cf. *Ryerson* v. *United States*, 312 U. S. 405; *United States* v. *Pelzer*, 312 U. S. 399; *Fondren* v. *Commissioner*, 324 U. S. —.

Clearly the corpus of the trusts falls within the definition. Distribution to William L. Disston, for example, has no relation to his reaching his majority, which he has now attained. He must live to attain the age of forty-five to enable him to receive one-half of the corpus. If he does not reach that age, his estate receives no part of the principal. The recipients are an undetermined group designated in the trust provision, among whom the beneficiary has a limited power of appointment. At the time of the gifts in 1936-1938 it was unknown who in fact would receive this one-half interest. Obviously the enjoyment was postponed.

As to the other half in William L. Disston's share, it likewise was unknown who would enjoy the corpus. One thing only was known, that the named child could not enjoy it. He would continue to receive the income from it for his life, but the principal was not given to him. The possibility that in an emergency the trustees might invade the corpus to the extent of ten per cent for his benefit did not confer a present interest in that part of the principal. The emergency by definition was extraordinary, something that might or might not occur at some indefinite future time.

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[2] See § 517(a) of the Revenue Act of 1932.

No present, certain and continuous enjoyment was contemplated, nor did it materialize. What has been said of the one minor is true of the others.

The question must be determined whether the trusts provided for a present interest in the trust income, or some definable portion of it. The first direction of each trust is to accumulate the net income until the minor reaches twenty-one. If that were all, it would again be clear that a future interest was created by the postponement of enjoyment. A later paragraph directs the trustees, however, "to apply . . . such income therefrom as may be necessary for the education, comfort and support of the respective minors" and to accumulate the remainder.

Respondent urges that this case differs from the *Fondren* case in that there the trust instrument showed that it was not contemplated that the income would be needed for education and support; and the trustee was directed to accumulate the income unless no other funds were available for such purposes, whereas here there is nothing in the trust instrument to indicate such an intent. In fact, respondent argues, the trust instrument means that the trustees *must* apply an amount of the income sufficient to provide for education, comfort and support, even though the minor is amply cared for by his parents, his own efforts, or other sources of revenue, citing 1 Scott, Trusts, § 128.4 and other authorities. When faced with the fact that the history of the trust's administration shows a practical construction by the trustees that support money need not automatically be paid over, respondent urges that the terms of the trust and the nature of the interest granted cannot be varied by what was subsequently done in administration.

The language of the trust instruments directs that the income be accumulated during minority. The subsequent provision for payments for maintenance and support may be said to indicate a departure from the policy of accumulation only when necessary, in the reasonable discretion of the trustees. If that is the appropriate interpretation of the trust instruments, then little difference from the *Fondren* case is involved. Even in its practical working, the trustees did not find the necessary prerequisites for a steady application of all or any ascertainable part of the income for education, support and maintenance.

But, even though the trustees were under a duty to apply the income for support, irrespective of outside sources of revenue,

there is always the question how much, if any, of the income can actually be applied for the permitted purposes. The existence of a duty so to apply the income gives no clue to the amount that will be needed for that purpose, or the requirements for maintenance, education and support that were foreseeable at the time the gifts were made. In the absence of some indication from the face of the trust or surrounding circumstances that a steady flow of some ascertainable portion of income to the minor would be required, there is no basis for a conclusion that there is a gift of anything other than for the future. The taxpayer claiming the exclusion must assume the burden of showing that the value of what he claims is other than a future interest. Cf. *New Colonial Co.* v. *Helvering,* 292 U. S. 435. That burden has not been satisfied in this case.

The question remains whether the adjustment of net gifts for 1936 in computing 1937 and 1938 tax liability is barred by the statute of limitations. As has been noted, § 502 requires utilization of "the aggregate sum of the net gifts for each of the preceding calendar years" in the formula for computing gift tax liability. Section 517(a) does not purport to bar adjustment of the net gift figure for that purpose, but simply prevents assessment and collection of a tax for a year barred by the statute. The statute does not purport to preclude an examination into events of prior years for the purpose of correctly determining gift tax liability for years which are still open. The Tax Court and Treasury Regulations have construed § 517(a) as requiring determination of the true and correct aggregate of net gifts for previous years.[3] The construction is in accord with the statutory language.

Accordingly, the judgment is

Reversed.

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[3] The pertinent Treasury Regulations 79, Article 5 provides: " . . . By the words 'aggregate sum of the net gifts for each of the preceding calendar years' (aside from the amount of the specific exemption deductible) is meant the true and correct aggregate of such net gifts, not necessarily that returned for such years and in respect to which tax was paid. . . ." See also Winterbotham v. Commissioner, 46 B. T. A. 972; Wallerstein v. Commissioner, 2 T. C. 542; Roberts v. Commissioner, 2 T. C. 679.